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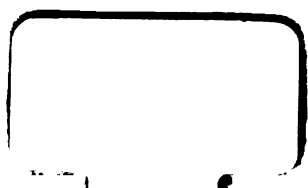
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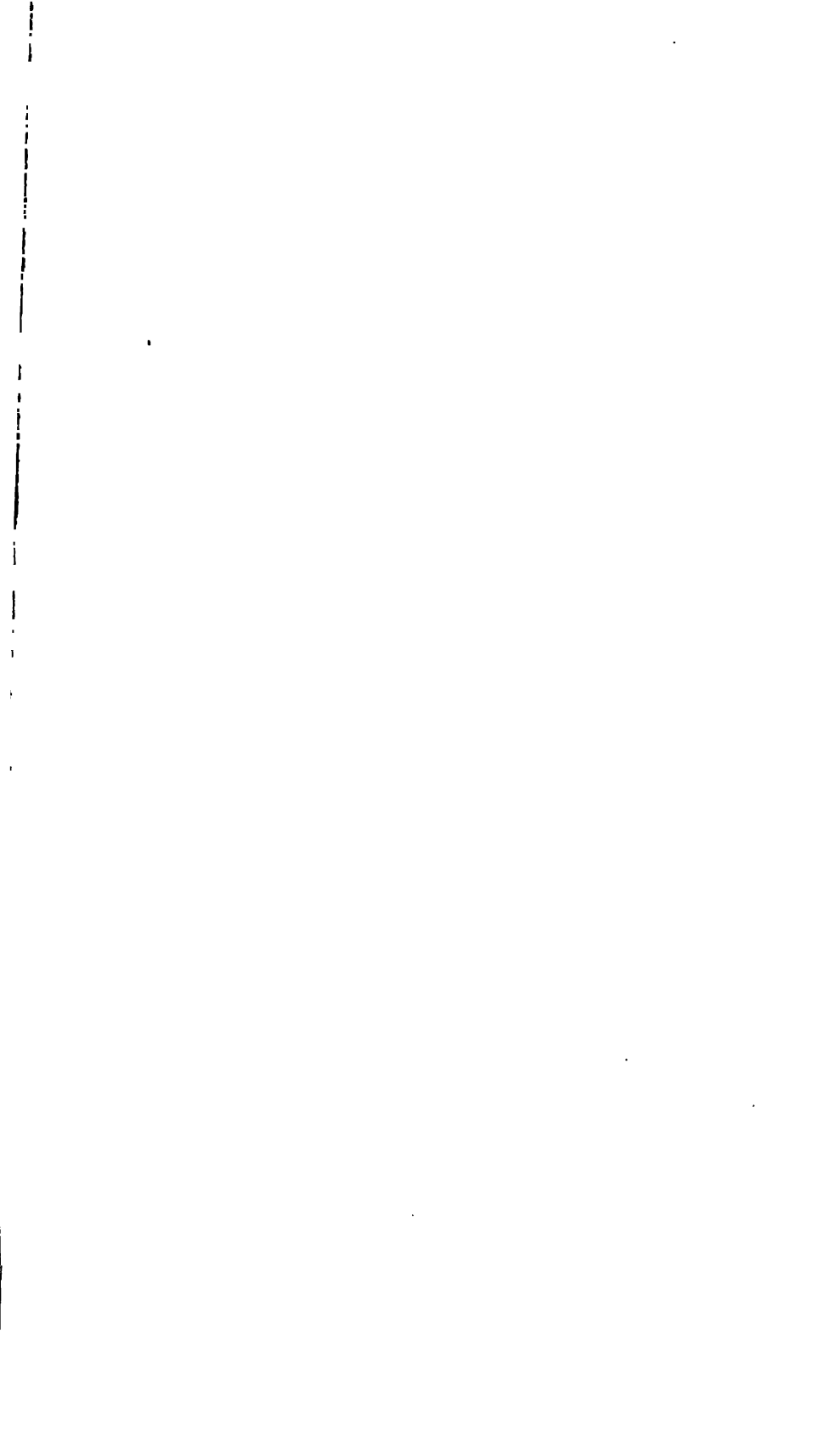
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VII



REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
Courts of Exchequer
AND
Exchequer Chamber.

WITH TABLES OF CASES AND PRINCIPAL MATTERS.

AND AN
APPENDIX,

CONTAINING

The Rules and Orders in force down to Michaelmas Term 1831, inclusive;
a Digest of the Modern Cases relating to Extent and Practice
in general; and the Statutes relating to Extents, &c.

By ROBERT PHILIP TYRWHITT, Esq.
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

"Ejus (*Analogie*) hæc vis est, ut id quod dubium est ad aliquid simile
de quo non quæritur referat; ut incerta certis probet."
Quinct. Inst. Orat. lib. i. c. 6.

VOL. I.

FROM MICHAELMAS TERM, 1 WILLIAM IV. 1830, to
TRINITY TERM, 1 WILLIAM IV. 1831,
BOTH INCLUSIVE.

LONDON:
SAUNDERS AND BENNING, 43, FLEET STREET,
AND
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PREFACE.

THE period at which the following Reports commence is Michaelmas Term, 1830, when the enactment of 11 Geo. 4. and 1 W. 4. c. 70. sect. 10.—that “all persons admitted or admissible to practise as attornies in the Courts of King’s Bench and Common Pleas shall be admissible in like manner as attornies of the Court of Exchequer”—came into operation. That clause went on to provide, that such persons, when so admitted, should be allowed to practise as attornies of the Court of Exchequer, without being obliged to employ a clerk in Court in the capacity of an attorney of the Court, While it appeared probable, that by thus throwing open the Court, its decisions would increase in number and importance, and that the new Rules and Orders with the other arrangements pending at the time, would assimilate its practice to that of the other superior Courts of Common Law in the main particulars, it was hoped that the Profession would receive with favor a new Series of Reports, combining the above cases with those occurring in the new Court of Error established by the same statute in the Exchequer Chamber.

The following volume comprises Reports in the above Courts from Michaelmas Term, 1830, to Trinity Term 1831, inclusive, with an APPENDIX, containing—

I. The Rules and Orders now in force in the Court of Exchequer of Pleas, collected and arranged under practical titles; together with those parts of statutes 11 G. 4. and 1 W. 4. c. 70.; and 1 W. 4. c. 3. which relate to Practice.

II. The Rules and Orders relating to Extents.

III. An Analytical Index to the modern cases in the Exchequer of Pleas relating to the process of Extent, and to Practice in general, from Easter Term, 1792, to Trinity Term, 1831, collected from the Reports of Anstruther, Forrest, Wightwick, Price, M'Clelland, Younge, Jervis, Crompton and Tyrwhitt.

IV. The Statutes 57 Geo. 3. relating to Extents in Aid; 3 Geo. 4. c. 46. and 4 Geo. 4. c. 37. as to Estreating Fines and Forfeited Recognizances; and 7 & 8 Geo. 4. c. 71. s. 5. relating to Distringas.

The compiler's best thanks are offered to the Noble and Learned Judges of the Court of Exchequer, and to many other members of the profession, for their courtesy and substantial assistance in this undertaking. However unequal these Reports may be to the standard to which the compiler would wish them to attain, they have cost him considerable labor and anxiety.

R. P. TYRWHITT.

TEMPLE, *January*, 1832.

BARONS

OF THE

COURT OF EXCHEQUER

DURING THE PERIOD COMPRISED IN THIS VOLUME.

SIR WILLIAM ALEXANDER, Knt. L.C.B.

The Right Hon. JOHN SINGLETON COPLEY,

LORD LYNDHURST, Lord Chief Baron.

SIR JOHN BAYLEY, Knt.

SIR WILLIAM GARROW, Knt.

SIR JOHN VAUGHAN, Knt.

SIR WILLIAM BOLLAND, Knt.

MEMORANDA,
FROM MICHAELMAS TERM, 1830, 1 W. IV. TO THE
END OF TRINITY VACATION, 1831, 1 W. IV.

IN the course of Trinity Vacation, 1830, *William Horne* and *John Williams*, Esqrs, King's Counsel, were appointed Attorney and Solicitor General to the Queen.

On the 11th of November, 1830, Mr. Justice *Bayley* resigned his office of one of the Justices of the Court of King's Bench, which he had filled since the 9th of May, 1808. The Learned Judge on this occasion received the testimony of the respect and regard of the Bar, conveyed to him in a forcible address by Mr. *Brougham*. On the 12th of November he was appointed a Baron of the Court of Exchequer, and took his seat accordingly.

On the 12th of November, 1830, *William Elias Taunton*, Esq. of Lincoln's Inn, King's Counsel, *Edward Hall Alderson*, of the Inner Temple, Esq. and *John Patteson*, of the Middle Temple, Esq. were raised to the degree of the Coif, and gave rings with the motto "*Nec temere nec timide*." *William Elias Taunton*, Esq. and *John Patteson*, Esq. then took their seats in the King's Bench, as Judges of that Court, and *Edward Hall Alderson*, Esq. took his seat in the Common Pleas, as a Judge of that Court. They were afterwards knighted.

Early in Michaelmas Term, 1830, Lord *Lyndhurst* resigned the Great Seal, which he had held since the first day of Easter Term, 1827. He was succeeded in the office of Lord High Chancellor by *Henry Brougham*, Esq. M. P. for Yorkshire, one of his Majesty's Counsel, who was raised to the Peerage by the title of Baron *Brougham* and *Vaux*, of *Brougham* in the county of *Westmorland*, and took his seat in the Court of Chancery on the 26th of November, 1830.

During Michaelmas Term, 1830, Sir *James Scarlett*, Knt. King's Counsel, and Sir *Edward Burtenshaw Sugden*, Knt. King's Counsel, resigned their respective offices of his Majesty's Attorney and Solicitor General. Sir *James Scarlett* was succeeded as Attorney General by *Thomas Denman*, Esq. of Lincoln's Inn, King's Counsel and Common Serjeant of the City of London, who was afterwards knighted; Sir *E. B. Sugden* was succeeded in the office of Solicitor General by *William Horne*, Esq. King's Counsel and Attorney General to her Majesty, who was also afterwards knighted.

John Williams, Esq. was appointed her Majesty's Attorney General, on the promotion of Sir *William Horne*, and *C. Pepys*, Esq. King's Counsel, succeeded to the vacant office of her Majesty's Solicitor General.

In Michaelmas Term, 1830, *George Heath*, Esq. was called to the degree of the Coif, and gave rings with the motto "*Metuit qui sperat.*"

In the Vacation after Michaelmas Term, 1830, *Robert Spankie*, Esq. Serjt. at Law, received a patent of precedence to rank after *Frederick Pollock*, Esq. King's Counsel; and *D. F. Jones*, Esq. Serjt. at Law, also received a patent to rank after the Hon. *C. E. Law*, K. C.

During the same period, *Thomas Coltman*, Esq. was appointed one of his Majesty's Counsel; and the Hon. *C. E. Law*, K. C. was elected Common-Serjeant of the City of London, vacant by the promotion of Sir *Thomas Denman*.

On the 18th of January, 1831, the Right Hon. *John*, Baron *Lyndhurst*, of *Lyndhurst*, in the county of *Southampton*, took the oaths and his seat as Lord Chief Baron vice the Rt. Hon. Sir *William Alexander*, resigned.

In Easter Term, 1831, *William Walton*, Esq. was appointed one of his Majesty's Counsel. During Trinity Term, 1831, *W. F. Boteler* and *J. A. F. Simpkinson* received the same honour; as did *H. W. Tancred*, *F. L. Holt*, *Philip Williams* and *Charles Butler*, Esquires, in the early part of Trinity Vacation.

THE FOLLOWING (AMONG OTHER)

WORKS,

BY THE SAME AUTHOR,

MAY BE HAD OF

SAUNDERS AND BENNING;

43, FLEET STREET.

I. **DIGEST** of the PUBLIC GENERAL STATUTES, 2 vols. 4to. Published March 1822. With an **ANALYTICAL INDEX**, in one vol. 4to. Published April 1823. [By Messrs. **TYRWHITT** and **TYNDALE**.]

II. **OBSERVATIONS** on the **MARRIAGE ACT**, 3 GEO. IV. c. 76. Published August 1822.

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REPORTS OF CASES,

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

IN THE EXCHEQUER OF PLEAS.

CUNNINGHAM v. REES.

1830.

Nov. 6th.

MANNING moved to discharge a peremptory undertaking to try this cause at the last summer assizes, upon an affidavit, stating the following circumstances: —A *subpœna ad respondendum* having issued against the defendant, he failed to appear, and an attachment issued accordingly. The plaintiff then discovered that, since the action brought, defendant had become insolvent, but declared on being ruled to do so. The defendant afterwards obtained a rule for judgment as in case of a nonsuit, which was discharged on giving a peremptory undertaking to try as above. In support of the motion *Manning* stated, that plaintiff had declared in order

Where a plaintiff, who knew the insolvency of a defendant, declared on being ruled to do so, in order to avoid the costs of a *non-pros*, and afterwards discharged a rule for judgment as in case of nonsuit on a peremptory undertaking to

try, the Court refused to discharge that peremptory undertaking.

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to avoid paying costs on a judgment of *non-pros*, which he would otherwise have incurred, and that the Court had only ordered the peremptory undertaking, because no sufficiently full affidavit of the time when the plaintiff knew of defendant's insolvency was produced by the plaintiff on the hearing of that rule; that motion would have been too late if postponed till after defendant had moved for judgment as in case of nonsuit for not proceeding to trial on the peremptory undertaking; that rule being absolute in the first instance, though it might be set aside on motion and payment of costs, if good cause could be shewn. (a)

Per Curiam. The plaintiff declares and goes on with the cause as far as a peremptory undertaking, to try with a full knowledge of the defendant's insolvency. A *stet processus* would have been the reasonable course, though it cannot be imposed on the parties.

Rule refused. (b)

(a) *Hutchinson v. Hutchinson*, 9 Price, 389. So in K. B. Sayer's R. 74. Barnes, 315.

(b) The insolvency of defendant after action brought, usually entitles the plaintiff to enter a *stet processus*, or to discharge the defendant's rule for judgment as in a case of a nonsuit, *Bailey v. Wilkinson*, 2 Doug. 671; but the practice of the Exchequer formerly was, not to discharge such a rule on a peremptory undertaking to try, except on payment by plaintiff of the costs of the application, *Hunt v. Boorne*, Forrest, 3. *Ellison v. Coath*, 2 Price, 16. *Fisher v. Hodgkinson*, 2 id. 90. 6 Price, 202. 7 Price, 531. 8 Price, 94; till, in *Brown v. Tanner*, M'Clel. R. 593. Mich. 1824, no merits being sworn to by the defendant, and good cause being shown for not going to trial, the practice was made conformable to that of the other courts; these costs being held costs in the cause to which defendant would be entitled if he succeeded at the trial, whereas plaintiff, if successful, would not be entitled to his costs of opposing the rule. Tidd, 9th Ed. 770.

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THE ATTORNEY-GENERAL v. HAWKES.

Nov. 8th.

THIS was an information against the defendant on 6 Geo. 4. c. 108. s. 35. (a) to recover a penalty of 500*l.* for offering a bribe to an officer of customs, and to recover another penalty under s. 45. of the same statute, for being concerned in unshipping certain goods, the duties for which had not been paid or secured.

An information by the Attorney-general on 6 Geo. 4. c. 108. s. 35. stated a bribe to have been offered by defendant to Thomas D. a custom-house officer. His name was proved to be Thomas Tyrrel D. Held no variance, as it could not have been pleaded in abatement.

The first count, for offering a bribe to an officer of customs stated his name as THOMAS *Dabbs*. The second, third, and fourth counts varied the statement of the offence. The fifth count described the goods unshipped without paying duty, as *bugles*, and also as *glass*, and the sixth for the same offence described them as a certain weight of *glass* only.

At the trial at the Exchequer sittings, before the Chief Baron, the verdict was for the crown, for a penalty of 500*l.* on the first count, and for two penalties of 100*l.* each on the fifth and sixth counts of the information. A rule nisi for a new trial, or for entering judgment on supported, by proof that these articles though they might also be called *beads*, were always called *bugles* at the custom-house, were entered and exported as such, paid a higher import duty than *beads*, and were spoken of by defendant as *bugles*.

Where, under 6 Geo. 4. c. 107. s. 16, 17. entry and landing were procured for a case of *toys* by bill of sight without perfect entry, and *bugles* were also landed in the same case, they were held liable to seizure, as landed without entry.

(a) Enacting "that every person who shall give, or offer or promise to give, any bribe, recompence or reward, or make any collusive agreement with any such officer as aforesaid (s. g. of customs, &c.) to induce him in any way to neglect his duty, or to do, conceal, or connive at any act whereby any of the provisions of any act of parliament may be evaded, shall, whether the offer be accepted or performed or not, forfeit the sum of 500*l.*"

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the fifth count only having been granted, and argued in the last term on objections urged at the trial,

ALEXANDER, L. C. B. now delivered the judgment of the Court.—The first count of the information stated, that a certain officer of customs, named THOMAS *Dabbs*, upon examination by him as such officer of a certain case containing goods, wares, and merchandize, which had been then and there imported from parts beyond the seas, to wit, *Hamburgh*, and which had been entered in the name of *H. and Co.* as containing toys, he the said THOMAS *Dabbs*, so being such officer as aforesaid, then and there discovered and found certain goods, other than toys, to wit, one hundred pounds weight of *bugles* in the said case, which last mentioned goods had been then and there landed without due entry thereof, contrary to the form and effect of a certain act, entitled &c. (6 Geo. 4. c. 108.) whereby and by force of the statutes in that case made and provided, the said goods then and there became and were forfeited, and liable to be seized by any officer or officers of customs, yet the said defendant, well knowing the premises, &c. did offer to give to him the said THOMAS *Dabbs*, so being such officer as aforesaid, and by whom the said goods other than toys had been discovered as aforesaid, a certain bribe, recompense, and reward, to wit, the sum of 10*l.* if the said THOMAS *Dabbs*, so being such officer as aforesaid, would take no notice of the said *bugles*, but pass the same, contrary to the statutes, &c.

The officer *Dabbs* was called at the trial as a witness, and as it appeared on his cross-examination that his name was *Thomas TYRREL Dabbs*, it was objected for defendant, that that was a variance from the name THOMAS *Dabbs* laid in the information. It was answered, that if a bribe was offered to him at all, it was immaterial whether it was laid as offered to THOMAS

Dabbs, or *Thomas TYRREL Dabbs*, and that *THOMAS Dabbs* was the name by which he was generally known. His evidence on cross-examination was, "I generally go by the name of *Thomas Dabbs*; I sign my name *THOMAS Dabbs*, without *TYRREL*." Thus the rule that it is a fatal variance where a third party named in the pleadings is not known by the name therein stated, (a) does not apply.

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Sulls's case (b) shews, that all the law requires on this subject even in indictments, is certainty to a common intent. There the owner of property stolen was laid as *Victory Baroness Turkheim*; her name without her title was proved to be *Selina Victoire*, and it was held, that as the prosecutrix had always acted in, and been known by the appellation, *Baroness Turkheim*, and could not possibly be mistaken for any other person, the name laid in the indictment must be taken to be her name. Again, by aid of an averment of the identity of *THOMAS Dabbs*, and *Thomas TYRREL Dabbs*, (c) the defendant might plead an acquittal on this information, by way of *auter fois acquit* to another information for offering a bribe to *Thomas TYRREL Dabbs* on this occasion. It was not my duty to leave it to the jury, as a separate issue, whether the officer was called *Thomas*, or *Thomas TYRREL Dabbs*, for no circumstances existed to require the jury's decision on a question, which at the trial was considered and treated as purely a question of law. As well in *Sulls's* case might it have been put to the jury, whether *Baroness Turkheim* was that lady's surname or not. As well in local or penal actions, where

(a) *Harvey v. Stokes*, Willes, 5. 8. *Hutchinson v. Piper*, 4 Taunt. 814. *Acerro v. Petroni*, 1 Stark. R. 100. *Bowditch v. Mawley*, 1 Camp. 194.

(b) *Lenoh*, C. C. 861.

(c) *Forman v. Jacobs*, 1 Stark. R. 47. *Samb.* it should be also averred that he was known by both the names stated in the two informations, so as to maintain the sufficiency of the first. 2 Hale, 244, 5. Hawk, b. 2. c. 35. s. 3.

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a particular parish being laid, the proof becomes material, (a) might it be put to the jury to say, whether the popular name of a parish was that of consecration, when, in the case of a penal action, those names being proved to be different, it has been held sufficient to allege the popular name. See Dr. *Leigh's* case cited in *Kirtland v. Pounsett*, (b) and *Williams v. Burgess*. (c) The law has never considered it material to be put to the jury as a distinct issue, and it has been ever considered sufficient that it is not withdrawn from their consideration.

Another objection to the first count was that, though it stated that in opening a case of toys, the officer found certain goods other than toys, viz. *bugles*, which had been landed without due entry, to pass which unnoticed a bribe was offered, the articles in question were not *bugles* but *beads*. Whether they were bugles or beads, some import duty was payable on both, and they were at all events liable to seizure, being entered as toys. They are called *bugles* at the custom-house, though, being in a globular form, they may also be called beads; they are entered and exported as bugles; they are called by that name only by all parties concerned, and pay a higher duty than beads. This objection has a strong analogy to the last, and my opinion is adverse to it. If the information had called these articles *beads*, the defendant would have urged, that he had been misled as to his defence, and that he must have entered, shipped, and exported them as *bugles*. The passages from Shakespear, cited as examples in Johnson's Dictionary, verb. Bugle, shew, that because an article is a

(a) So in actions for use and occupation, which are not necessarily local, unless a parish is laid, when it must be proved. *Guest v. Cammell*, 3 Campb. 235.

(b) 1 Taunt. 570.

(c) 3 Taunt. 127.

bead, it is not excluded from being a bugle (a). Though it is not necessary to the decision, I will add, that the defendant adopted the term *bugles* in saying "Here are some *bugles*; I'll give you 10*l.* if you'll not notice them." In the fifth count, the defendant is stated to have been assisting and otherwise concerned in unshipping certain other goods, then and there liable to payment of certain duties, the duties for which had not been paid or secured, that is to say, divers, to wit 200 lbs. weight of *other bugles*, and divers, to wit, 100 lbs. weight of *glass*. In the sixth the goods unshipped are called *glass*. The alternative of the defendant's rule is, that judgment may be entered on the fifth count only for a penalty of 100*l.*, under 6 Geo. 4. c. 108. s. 45. The defence now set up, is that these goods were not imported under that provision, but according to 6 Geo. 4. c. 107. s. 23. That act first provides by s. 2, that no goods shall be unladen from any ship arriving from parts beyond sea, or bulk broken, before due report of such ship, due entry made of the goods, and warrant granted in manner therein directed. By s. 16, importers are to make perfect entry inwards, or entry by bill of sight, which perfect bill of entry after certain particulars are complied, with becomes by s. 17, the warrant for landing or delivering the goods. In this instance the importer followed the course pointed out by s. 23, viz. making oath that for want of full information he could not make a perfect entry, and obtained an entry by bill of sight, and thereupon a warrant for landing toys. That bill of sight was no protection to the bugles, or to the defendant for

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(a) " *Bugle* bracelet, necklace amber,
Perfume for a lady's chamber."—*Winter's Tale*, A. 4. Sc. 3.

" 'Tis not your inky brows, your black silk hair,
Your *bugle* eye-balls nor your cheek of cream,
That can entame my spirits to your worship."

As you Like It.—A. 3. Sc. 5.

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landing them without entry. The whole was a fraudulent transaction.

GARROW Baron concurred.

VAUGHAN Baron. I agree in the general result of the judgment delivered by the Lord Chief Baron. As to the first alleged variance, that the name of the officer as stated in the information was mistaken, if the question had stood on cross-examination, my name is *Thomas Tyrrel Dabbs*, the objection would have prevailed; but on further examination he is as well known by one *designatio personæ* as the other. The mistake is not in the name of the defendant, but of a third person, the witness, so that no plea in abatement could be pleaded. It arose in a collateral matter, and was the effect of an admission of the defendant's counsel, who contended he must be known as *Thomas Dabbs* only.

The second point is that the articles imported were beads, not bugles. This was another substantive allegation of fact to be found by the jury, and the evidence on it not having been withdrawn by the Lord Chief Baron, but having been left to co-operate in their decision, must be taken to be found by them. It is true that the goods must be proved to be what they are described to be, and the averment, if material, will not be aided by being laid under a *videlicet*; *Grimwood v. Barritt (a)*, *Pope v. Foster (b)*. Had this been an information for duties on bugles, and the defendant had insisted they were beads, the duties on which he had offered, the question would have been, whether they were beads or not? That point is not necessary to the judgment for the crown in this case. The defendant here admitted them to be bugles.

BOLLAND B. concurred.

Rule discharged.

(a) 6 T. R. 460.

(b) 4 T. R. 590. See 9 East, 157. 3 B. & C. 2. 4 B. & C. 403.

1830.

IN THE EXCHEQUER CHAMBER.

ALEXANDER v. ANGLE.

(In Error from the King's Bench.)

Before TINDAL, L. C. J. — GASELEE, BOSANQUET, Nov. 13th.
and ALDERSON, Justices. — GARROW, VAUGHAN,
and BOLLAND, Barons.

THIS was an action for verbal slander; no justification was pleaded, and the plaintiff had a verdict for entire damages on the whole declaration. The *first* count, after the usual inducement of the plaintiff's good reputation among his neighbours, and a denial of the offences and misconduct thereafter mentioned to have been imputed to him by the defendant, stated "That the plaintiff, for a long time before, and at the time of the committing of the several grievances thereafter mentioned, had been, and was, and still is, a keeper of livery-stables, and during all the time aforesaid kept the said livery-stables, and carried on the trade and business of a livery-stable keeper," whereby the said plaintiff acquired profit and emolument, to the comfortable support of himself and his family. The *last* count was as follows: And whereas also before committing the grievances hereinafter next mentioned, *J. Peer* had been prover under bankruptcies," (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankrupt.)—Verdict for plaintiff on all the counts. Held, on error brought, 1st, That the words did not impute a charge against the plaintiff in the way of his trade and business; and, 2dly, That the innuendo imputing a crime punishable by law, was badly pleaded as enlarging the natural meaning of the words used, without resting on any introductory averment of a colloquium respecting the proof of fictitious debts; and a *venire de novo* was awarded.

Case for defamation. The *first* count stated as inducement, that plaintiff was a livery-stable keeper, and by that trade and business acquired profit. The *last* count stated that defendant spoke these words of and concerning the plaintiff, and of and concerning him in his said trade—"You (meaning the said plaintiff) are a regular

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come a bankrupt, and the said plaintiff was about to prove a debt justly due to him by the said *J. Peer*, under a commission of bankrupt theretofore duly awarded and issued against the said *J. Peer*, yet the said defendant, well knowing the premises, and further contriving, &c. in a certain other discourse, which he the said defendant then and there had with the said plaintiff, of and concerning the said plaintiff, and of and concerning the matters in the introductory part of *this* count mentioned, and of and concerning him in his trade aforesaid, then and there, in the presence of divers other good and worthy subjects of this realm, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said matters last mentioned, these other false, scandalous, malicious, and defamatory words following, that is to say, You (meaning the said plaintiff) are a regular prover under bankruptcies, (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankrupt); you (meaning the plaintiff) are a regular bankrupt maker, if it was not for some of your (meaning the plaintiff's) neighbours, your (meaning the said plaintiff's) shop would look queer; it is all true, and you (meaning the said plaintiff) may bring as many actions against me (meaning the said defendant) as you like. By means of which said grievances, the plaintiff has been injured in his name, fame, and credit, and in his trade and business, &c.

Platt, for the plaintiff in error, was to contend that two other counts of the declaration, as well as the last, respectively contained words not actionable, and that the second inuendo in the last count was too large; but was stopped by the court, who called on

Kelly for the defendant in error, to support the last count. The words laid do not directly allege the plaintiff below to be guilty of any specific punishable offence. Yet according to the common understanding of the language in which they are couched by the persons present when they were uttered, they impute a serious offence, viz. as stated in the inuendo, that plaintiff below was in the habit of proving fictitious debts under commissions of bankruptcy. To support an action for slander, it is not necessary that a distinct offence punishable by law should be alleged. It is sufficient that such a charge may be inferred; and supposing the words used "you are a regular prover under bankruptcies," are capable of such a construction, the jury are competent to decide on their popular sense. If those words are not in themselves actionable, still, as it is well known that a class of persons exist who make a practice of claiming fictitious debts before commissioners of bankruptcy, in order unduly to control the choice of assignees, these words may be found by the jury to have been used in a sense including that charge, though the words admit another construction than that stated in the declaration. It is sufficient if a body of hearers understand that they did import a charge of a punishable offence, as a jury having regard to such hearer's situation in life have in this instance found that they did. In the notes to *Craft v. Boite* (a), Serjt. Williams states it as an established rule, that slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them, and cites *Woolnoth v. Meadows* (b). There the defendant said of the plaintiff "that his character was infamous, that he would be disgraceful to any society, that those who proposed him as a member of any society

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(a) 1 Saund. by Williams, 242.

(b) 5 East, 463.

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must have intended an insult to it, that he would publish his shame and infamy, that *delicacy forbade him* from bringing a direct charge, but it was a male child who complained to him ;” these words were held sufficiently certain in themselves to be actionable, as imputing a charge of unnatural practices, without the aid of any inuendo to that purpose. Again in *Roberts v. Camden* (a) the rule that words are to be understood in *mitiori sensu*, is stated as long ago superseded, words being now construed by courts in the plain and popular sense in which the rest of the world naturally understand them. The words there were, “ He is under a charge of a prosecution for perjury ; G. W. has the Attorney-General’s directions to prosecute him for perjury,” and might be used innocently, *e. g.* that *Roberts* was ordered by the Attorney-General to be prosecuted for a perjury which he was supposed to have committed, in which case the jury might have acquitted him, according to *Oldham v. Peake* (b). There Mr. Justice *Gould* laid it down, that what was the defendant’s meaning was a fact for the jury to decide on ; and Lord *Mansfield*, in the same case (in K. B. in error) (c) said, “ if the words had been shown to be innocently spoken, the jury might have found for defendant, but they have put a contrary construction on them as laid.” In *Roberts v. Camden*, there was no direct charge of perjury, but that plaintiff was “ under a charge of a prosecution for perjury,” and Lord *Ellenborough* declares the question simply to be, whether the words amount to such a charge, *i. e.* whether they are calculated to convey to the mind of an ordinary hearer an imputation on the plaintiff of the crime of perjury. So in the present case the signification of the words used is to be left to a jury, who know the language in which offences of this nature are ordinarily described,

(a) 9 East, 95.

(b) 2 Sir W. Bla. 962.

(c) Cowper, 277.

to say whether words alluding to a common malpractice, and which *may* impute an offence, *do* impute the offence laid. They may merely mean the act of a fair creditor unhappily driven to prove debts under several bankruptcies, and if so, they would mean no more than in *Roberts v. Camden* they were found to do; but if on the other hand they may import that he was a regular prover of debts which either had no existence or were exaggerated, this count may be sustained on the finding of the jury that they do import that malpractice. Secondly, as to the inuendo. Supposing persons guilty of the offence above alluded to, regularly pass in the metropolis by the name here laid, how could a count be otherwise framed? The record states that plaintiff was about to prove a debt against *J. P.* under a commission duly awarded, yet that defendant spoke the words in question of him in his trade and business as a livery-stable keeper.

Now, supposing the meaning of the words as found by the jury, to be the real and ordinary meaning which as they *may*, so they *did* in this instance bear, then by the bankrupt act, 6 Geo. 4. c. 16. s. 46., under which provision, as well as s. 110, proof of debts is to be on oath, they indirectly charge or include perjury, or at all events, such misconduct in trade as is actionable. Chief Baron *Comyns* in his *Digest*, tit. Action on the Case for Defamation, D. 27, shews that slander of a person in trade is not confined to slander imputing insolvency or deceit in trade; but extends to words charging malpractice in it. The charge of proving a fictitious debt imputes a malpractice in trade, and the jury have found that to be the meaning of the words.

TINDAL C. J. delivered the judgment of the Court.—The plaintiff in error contends, that one count on which the judgment below has been given is bad, and if so,

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that entire damages having been assessed on all the counts, the case must be sent to the judgment of another jury by *venire de novo*. (a) The Court is of opinion, that the last count is bad, as not containing a charge against the plaintiff below, in the way of his trade or of a criminal nature as laid in the inuendo. It has been argued, that the words *may* import a charge against plaintiff; first, in the way of his trade, and secondly, as coupled with the crime of perjury, a charge which, it is said, necessarily results from the words proved. On the first question, this case does not fall within those cited from *Comyns*. They only apply to reflections on a man in the way of his trade, as that his work is bungling, his merchandizes bad, or his credit defective, or imputing a want of honesty or solvency, which would destroy his credit as a trader; whereas the imputation here conveyed, does not apply to the party or his business merely, but would equally embrace a person out of trade or in it.

On the second question, whether these words impute a crime, punishable by law, we are of opinion, that the inuendo being much larger than the natural meaning of the words, cannot, consequently, be well pleaded, unless duly connected with an introductory averment; and that no *colloquium* respecting proving fictitious debts under a commission of bankrupt (b) being so stated or referred to in this count, it is bad. In *Woolnoth v. Meadows*, and *Roberts v. Camden*, the slanderous matter appeared on the face of each record to the Court which was to judge of it, and was held actionable; the meaning in each case being clear to every understanding. Therefore those cases do not warrant the conclusion, that this ac-

(a) In order that they may sever the damages. See 9 East, 94.

(b) *Barham's case*, 4 Rep. 20 a. *Roberts v. Camden*, 9 East, 95. The new matter attempted to be introduced by the inuendo being necessary to support the action. *Hawkes v. Hawkey*, 8 East, 430. *Blandy v. Hall*, 1 Y. & J. 480. *Goldstein v. Foss*, 6 B. & C. 154. 4 Bing. 489. S. C.

tion could have been supported as well without as with the innuendoes. (c)

Judgment of K. B. reversed, and *venire de novo* awarded.

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(b) When the words impute a crime, and are therefore actionable in themselves, an innuendo not warranted by a precedent colloquium may be rejected as surplusage, 9 East, 94. In *Goldstein v. Foss*, 4 Bing. 493. the Court of error held, that for want of introductory averment of a colloquium, no actionable charge appeared on the record, and that the defect was not cured by a verdict for plaintiff, the question turning on the construction of words which were not adequately shewn to bear any other than the natural meaning. If a verdict was to cure such a defect, it would deprive parties of the valuable privilege of an appeal to a Court of Error; though 32 Geo. 3. c. 60. s. 4. (Mr. Fox's bill) expressly reserves to defendants the liberty of moving in arrest of judgment in criminal cases, which for this purpose are in *pari materia* with civil actions.

IN THE EXCHEQUER OF PLEAS.

YOUNG and Others, Assignees of IRELAND, a Bankrupt, Nov. 15th.
v. TIMMINS and Another.

THIS was an action for the balance of an account due to the bankrupt—plea general issue—tried before the Chief Baron at the Summer Assizes for *Warwickshire*. A verdict was taken for the plaintiff subject to an award, and also to a motion for a new trial, which

Hill now made. At the trial defendant had given notice to dispute the petitioning creditor's debt; but the bankrupt had not given notice to dispute the commission, which was dated 9th April, 1829, within the two or twelve months after the adjudication allowed for that purpose by 6 Geo. 4. c. 16. s. 92. The action being one which the bankrupt himself might have sustained against the defen-

of it, under 6 Geo. 4. c. 16. s. 92. though defendant offered to prove its fraudulent origin, and the time allowed for a bankrupt to dispute the commission had elapsed.

Where, in assumption by assignees of a bankrupt the general issue was pleaded, and defendant had given notice to dispute the petitioning creditor's debt, the depositions before the commissioners were held conclusive evidence

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dant (a), the plaintiffs put in the depositions before the commissioners, contending that they were "conclusive evidence" of the matters therein contained within the above section, and *inter alia* of a good petitioning creditor's debt. It was admitted, that had any fault appeared on the face of the proceedings their weight would have been so far diminished (b). On the part of the defendant, evidence was proffered that the petitioning creditor's debt was concocted in fraud between him, being also assignee, and the bankrupt. Now as the legislature, in giving force to a commission, proceeds on the assumption that its foundation, the petitioning creditor's debt, is a *bonâ fide* transaction, and treats the bankrupt as throughout adverse to the bankruptcy, the enactment making the commission valid if not disputed by him within a certain time, only applies where the bankrupt, not having colluded with the petitioning creditor, has an interest to watch the proceedings. An estoppel is subject to be opened, and conclusiveness to be rebutted in law by evidence of fraud, without reference to the lapse of time, which in many cases by positive enactments operates as a confirmation of acts done. Fraud goes to the foundation of the whole transaction, avoiding the whole, and destroying all evidence of it; thus the depositions in this case, were not those intended by the act to be "conclusive evidence of the matters therein contained." A fine with proclamations may be disputed for fraud in the conusor, in being seised of an estate for years only in the land, though the proclamations and the five years have passed, (c); and as these proceedings if

(a) See *Muskett and others, assignees, v. Drummond*, 10 B. & C. 159.

(b) But in *Macbeath v. Coates*, 4 Bing. R. 34. where on a trial, no notice having been given to produce the commission, the proceedings under it, as well as the commission, were put in, but no perfect petitioning creditor's debt appeared on them; it was held on this section, that nevertheless, the validity of the commission could not be disputed. And see *Bluck v. Thorn*, 4 Campb. 191. *Bernasconi v. Glengall*, 1 M. & Ryl. 326.

(c) See *Fermor's case*, 3 Coke's Rep. 77 a.

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fraudulent never had effect, the fraud and covin need not be expressly averred (a). [*Bayley B.*, should you not have petitioned the Chancellor to supersede the commission?] The language of the 92d section, if applicable in cases of fraud, would make the depositions as conclusive evidence before the Chancellor, as at a trial at *nisi prius*. The case is one of the first impression.

Per Curiam. It is admitted that the evidence given would be conclusive under 6 Geo. 4. c. 16. s. 92. had not fraud intervened in concocting the petitioning creditor's debt. But on the principle of construction contended for, assignees might, on a similar notice, be taken by surprise at a trial, by the necessity of proving the trading, act of bankruptcy, &c. without having had notice of any intention to dispute them. The object of the legislature was to make the proceedings before the commissioners conclusive evidence of the bankruptcy, without withdrawing *in aliud examen* from the tribunal of the Lord Chancellor, the question whether the commission was or was not duly founded.

Rule refused. (b)

(a) But see the case of the *Chancellor, Master and Scholars of the University of Oxford*, 10 Coke, 56. a. b. that it must be expressly averred, though it may be generally alleged; *Tresham's case*, id. 110. a.; and see 2 M. & S. 377, *Hill v. Montagu*; and *Edwards v. Brown and others*, Hil. Term, 1831.

(b) See *Fowler v. Coster*, 10 B. & C. 430.

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LADD v. WILSON and Others.

Time being given till 27th January to justify bail, on the 25th plaintiff ruled the sheriff to bring in the body in six days. On the 27th the plaintiff took an assignment of the bail-bond: on the 30th the bail justified. Proceedings on the bail-bond were staid without ordering it to stand as a security; for the time of perfecting bail was enlarged by the body rule, and plaintiff might have gone on to trial in the original action.

ON a former day, *Chilton* obtained a rule to stay proceedings on the bail bond, on affidavit of the attorney of the bail, that defendant had been misled as to putting in bail above, by pursuing the established practice of the Courts of King's Bench and Common Pleas, at a time when the practice of this Court on the subject of taking an assignment of the bail bond pending a rule to bring in the body was unsettled, and before the case of *Whittle v. Oldacre* (a) had been overruled in this Court in a previous decision between the parties in the original action. (b) The rule was granted on the terms of payment of costs and rendering the defendant.

John Jervis now shewed cause. First, the affidavits in support of this rule cannot be used, not being properly entitled, "*Edward Nicolas Ladd v. George Wilson and others*," for the christian and surname of each of the parties should be inserted in the title; *Fores v. Diemar*, (c) *Rex v. Sheriff of Surrey*, (d) *Doe d. Spencer v. Want*. (e) — [*Bayley* B. having intimated that the affidavits might be altered *quoad hoc*, and resworn so as to satisfy those cases, *J. Jervis* proceeded.] — The question on the merits is, whether the bail bond is to stand as a security on making this rule absolute. The writ was returnable on 28th November 1829. Bail above having been put in and excepted to, time was given to justify till 27th Ja-

(a) 7 B. & C. 478. Mich. 1817. 1 M. & R. 298. S. C.


(b) *Ladd v. Arnaboldi*, 1 Cr. & Jer. 97. Tr. 1830.

(c) 7 T. R. 661.

(d) 2 East, 182.

(e) 2 B. Moore, 722.

January 1830, and notice of adding and justifying bail was given for that day. On the 25th the sheriff was ruled to bring in the body in six days, and the bail not having justified on the 27th, the plaintiff took an assignment of the bail-bond on that day and proceeded thereon. The bail justified on the 30th, and the body rule expired on the 31st. A motion was afterwards made to set aside the bail-bond for irregularity, but the assignment of the bail-bond was held regular according to the practice of this Court, though the sheriff had been ruled to bring in the body, and the proceedings against the sheriff and the bail were therefore concurrent. The case of *Whittle v. Oldacre*, by which a contrary practice was settled in the King's Bench, was held not to apply. But the Court made the rule absolute to stay proceedings on the bail bond on its standing as a security, and on payment of costs. The defendant, however, did not draw up and serve the rule, but pleaded to the declaration on the bail bond *comperuit ad diem*, upon which issue was joined. The event of the action on the bail-bond then depended on the date of the appearance stated in the plea, and which was to be proved by the entry of the recognizance of bail of the term generally, in the books of the Court. The plaintiff moved, on the authority of *Austen v. Fenton* (a) and *Allday v. George*, (b) to record the appearance of the bail on the 30th *January*, the day they actually justified. This rule was made absolute after reconsidering the case of *Whittle v. Oldacre*, and the former authorities. On the present rule the bail-bond should still stand as a security, for though the defendant has been in custody in other actions at suit of the plaintiff since 28th *April*, the plaintiff might otherwise have gone on to judgment on the bail bond.

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(a) 1 Taunt. 23.

(b) 9 Price, 406. And see *Leigh v. Bertles*, 6 Taunt. 167.

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Chilton, for the bail, contended that the plaintiff was not entitled to the security of the bail bond, as no trial had been lost in the original action; and on the question of costs, said that the bail were not liable to pay those of the original unsuccessful motion to set aside the bail bond for irregularity, that measure having been adopted by the defendant himself. It was sworn that the bail applied at their own expense, and for their own indemnity without collusion with the defendant in the original action.

BAYLEY B. The bail bond ought not to stand as a security, because the plaintiff might have gone on to trial in the original action had he thought fit, when the bail above were perfected on 30th *January*. (a) But as the affidavits do not state that the bail were not parties or privies to the first application by the defendant to set aside the bail-bond for irregularity, they must be taken to be privy to it, as they would have benefitted by its success, and must therefore pay the costs to the plaintiff on its failure. The costs on the plea of *comperuit ad diem* will be costs in the action on the bail-bond, as well as those of the second motion consequent on that plea.

VAUGHAN B. I regretted overruling *Whittle v. Oldacre* on a former occasion, and am of opinion that in future the practice of this Court should be assimilated in this respect to that of the other courts.

BAYLEY B. It is desirable that it should in future be understood, that where a plaintiff rules the sheriff to bring in the body, he should be considered as extending the time for the bail to the sheriff to put in bail

(a) See Tidd, 9th Ed. 803.

above. The master will frame a rule of court accordingly. (a)

Rule absolute on payment of the costs of the unsuccessful motion in the original action, the costs of the action on the bail bond, the costs of the motion to amend the entry of the recognizance, and of the present application.

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(a) The settlement of this rule of practice in the Exchequer, is most important to country bail; the ordinary course being, that the plaintiff rules the sheriff to bring in the body, and he gives notice to the bail below, thus affording them an opportunity to put in bail above, so as to render defendant, or justify, before the body rule expires. See Tidd, 9th Ed. 282; and *Whittle v. Oldacre*. The defendant's appearance being then entered generally of the term in which the writ is returnable, is a defence to the bail-bond, on a plea of *comperuit ad diem*, S. C. The occasional variance which has almost unavoidably arisen in the decisions of the three courts on points of practice, seems to have occurred partly from the varying nature of the process used to effect the same purpose, and partly from want of that authorised superintendence by the aggregate body of the judges, which is necessary as well to continue as to introduce an uniform course of practice in each court on the subjects over which it has a common jurisdiction with the rest. This important object is now provided for by 1 W. 4. c. 70. s. 11.

MORGAN and Another v. STEPHEN JONES.

Nov. 25th.

ASSUMPSIT.—First count stated, that whereas The words
heretofore, to wit, on the 4th day of *August*, “value re-
in year of our Lord 1820, to wit, at, &c. in consider- interest” oc-
curring in an
instrument which is not negotiable as a promissory note or bill of exchange, do
not of themselves import a money consideration so as to satisfy an averment that
money was lent by plaintiffs to defendant.

An instrument by which money was made payable on a contingency cannot be
given in evidence as a promissory note, on the counts for money lent, or on the
account stated, though sued on between the original parties, and expressing
value to have been received.

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ation that the said plaintiffs at the special instance and request of the said defendant, would lend and advance to him the said defendant a certain sum of money, to wit, the sum of 75*l.*, he the said defendant undertook, and then and there faithfully promised the said plaintiffs to pay to them the said sum of 75*l.* with lawful interest for the same, nine years after the said 4th day of *August*, in the year of our Lord 1820 aforesaid, provided that one *David Morgan*, the brother of the said plaintiffs should not return to *England*, or his death be duly certified in the meantime; and the said plaintiffs in fact say that they relying upon the said promise &c. of the said defendant so by him made as aforesaid, did afterwards, to wit, on the same day and year aforesaid, to wit, at, &c. lend and advance to the said defendant the sum of 75*l.*; and the said plaintiffs also in fact say, that the said *David Morgan* the brother of the said plaintiffs hath not yet returned to *England*, nor hath his death been duly certified, to wit, at, &c. Nevertheless the said defendant, not regarding, &c. but contriving, &c. hath not as yet paid the said sum of 75*l.* with lawful interest thereon, or any part thereof to the said plaintiffs, but hath hitherto altogether refused and still neglects and refuses to do. The second count stated, that in consideration that the said plaintiffs, at the special instance, &c. of defendant, would permit and suffer defendant to receive and take a certain sum of money, to wit, the sum of 75*l.* then in the hands of one *David Jones*, defendant undertook, &c. to pay to them the said plaintiffs, nine years after the 4th day of *August* in the year of our Lord 1820, the sum of 75*l.* with lawful interest for the same, provided *David Morgan* the brother of the said plaintiffs should not return to *England*, or his death be duly certified in the mean time. Yet plaintiffs in fact say, that although they, confiding, &c.

did afterwards, to wit, on, &c. permit and suffer defendant to receive and take the said last mentioned sum of 75*l.* and the same by virtue of the said permission and sufferance, was then and there paid over to defendant, and plaintiffs in fact say, that the said *David Morgan* hath not returned to *England*, nor hath his death been duly certified, to wit, at, &c. Nevertheless the said defendant not regarding, &c. but contriving, &c. hath not as yet paid the said sum of 75*l.* with lawful interest thereon, or any part thereof to plaintiffs, but to pay the same hath hitherto altogether neglected and refused, and still neglects and refuses so to do. Counts for money lent, paid, had and received, and on an account stated. Pleas, 1st, *Non assumpsit*; 2d, Statute of limitations.

At the trial before *Goulburn J.*, at the last *Carmarthenshire* great sessions, the following instrument was proved in support of the plaintiffs' case, being stamped as an agreement and also as a promissory note.

" 4th August, 1820.

" Nine years after date, I *Stephen Jones* promise to pay to *John Morgan* and *James Morgan* 75*l.*, provided their brother *David Morgan* shall not return to *England*, or his death be duly certified in the meantime, with lawful interest for value received.

(Signed) " *Stephen Jones.*"

It was also proved by the uncle of *David Morgan*, that the latter had left *England* twenty-four or twenty-five years ago, and had never been heard of since. No other evidence was given, except that of the execution of the note. On the part of the defendant it was objected, that the plaintiff had failed on the special counts, as he had not given any evidence whatever of the con-

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siderations therein averred, and that the instrument being void as a note, by reason of the contingency, would not as such support any of the common counts. It was replied on the part of the plaintiffs, that the paper was at all events evidence of an account stated, or of money lent. The learned Judge, however, thought the objection well founded and nonsuited the plaintiffs.

A rule having been obtained by *Russell* Serjt. to set aside the nonsuit, and enter a verdict for the plaintiffs for 75*l*.

R. V. Richards and *E. V. Williams* now shewed cause. — In order to charge the defendant on the agreement, the plaintiffs must prove a consideration, for this is not a negotiable promissory note. The real question is, whether this special agreement to pay 75*l*. on a contingency can be given in evidence on the common counts for money lent, or on an account stated? Now the statute of limitations having been pleaded, this sum cannot be contended to have been money had and received to the use of the plaintiffs, or to be due to them on an account stated at a later period than 4th August 1820, when that agreement was entered into. So, if any money was lent, it was then lent on a promise to be performed nine years after. But this declaration was necessarily special, in order to set forth the time of repayment as depending on a contingency, and to show that contingency to have happened. (a) Then the consideration alleged in the first count, viz. money lent by plaintiffs to defendant, must be proved as well as the fulfilment of the special condition; but there was no evidence of a loan, or of value passing. The agreement cannot be given in evidence on the common counts, for it

(a) *Guy v. Gower*, 2 Marsh. R. 273. *Davis v. Nicholls*, 2 Chit. Rep. 320.

is not a promissory note payable at all events, and the cases in which counts on a special agreement may sometimes be abandoned, and the common counts resorted to, turn on a consideration in part executed, and the receipt by the defendant of benefit therefrom which he is not to reap gratis (a). No such benefit has been here received. This contract is in the nature of a wager. In *Bovey v. Castleman* (b), defendant agreed to pay plaintiff 100*l.*, if the Duke of *Saxony* did not enter *Dauphiny* in a time limited, and plaintiff agreed to pay plaintiff 100*l.* if he did; and it was held that *indebitatus assumpsit* would not lie, for the allegation of mutual promises was necessary to raise the *assumpsit*. The absence of real consideration was also urged; but that can make no difference to the validity of a contract if the plaintiff incurs a risk. However, in *Leaves v. Bernard* (c), sixteen guineas having been paid by plaintiff to defendant, a real consideration appeared for the promise of defendant to pay plaintiff 100*l.*, if no garrison of 2000 men in *Flanders* should be taken by the *French* before a day fixed; but the declaration was held bad on demurrer, because the value of sixteen guineas so alleged to have been paid, was not averred. In insurances a small sum is paid to receive a larger, if a certain event happens; but if in case of variance between the special counts and the policy produced, that instrument could be given in evidence on the common counts, the insured, after proving the loss, would always rely on the account stated. Where value received is stated as a consideration, the law presumes that a sum has been advanced corresponding with that to be paid; but here the sums differ, and the sum to be repaid with interest

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(a) See on this subject 1 Campb. 38. Cases collected, 1 Chitty on Pleading, 4th Ed. 303.

(b) Lord Raym. 69.

(c) 5 Mod. 131.

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might from the contingency be more or less than that advanced.

Russel, Serjt. and *John Evans* in support of the rule.—Admitting that the special counts were necessary, the first was proved by the instrument produced; but at all events, the count on an account stated was supported by this evidence of a writing acknowledging a debt and promising to pay it. If, as is argued, there was no other *primâ facie* evidence of money or value having passed in goods or otherwise, than the words of the instrument, “value received,” there might have existed another mode of loan, *e. g.* that on the sale of property by the plaintiffs, in which their brother *David*, who had been long absent abroad, had an interest under his father’s will, his share of the purchase money was lent by the plaintiffs to the defendant in the interim, as it would have belonged to them if he did not return. [*Bayley*, B.—That, if proved, would not support the allegation in the special count, that money was lent by plaintiffs to defendant.]—But the words “value received,” import on the face of the instrument the consideration alleged, viz. money lent by the plaintiffs to the defendant, *Bishop v. Young*. (a) It appears from *Harris v. Huntback*, (b) that between the original parties a note acknowledging the receipt of money and promising to be accountable, supports a count for money lent; and from *Story v. Atkins*, (c) that stat. 3 & 4 Anne, c. 9. only gives an additional remedy on a promissory note by declaring on it, without giving further proof of its consideration; but does not take away the former action of *indebitatus assumpsit* for money lent, in which

(a) 2 B. & P. 78.

(b) 1 Barr. 373.

(c) 2 Salk. 725. *Hard’s case* Salk. 23.

the note was evidence as a writing to prove the defendant's receipt of so much money from the plaintiff. Though the decision in *Bovey v. Castleman*, is quoted on the other side, the reason on which it is founded, that a real consideration must appear, is repudiated. In *Leaves v. Bernard* there was no *real* consideration executed, and the *assumpsit* is special on the mutual promises according to the rule in *Bovey v. Castleman*.—Secondly, conceding this not to be a promissory note within the statute of *Anne*, so as to enable it to be declared on as such *per se* with an implied consideration, it was admissible in evidence on the common counts on a principle not differing from that by which a promissory note is so received. It is laid down in *Bayley on Bills*, (a) that a note is *primâ facie* evidence of money lent by payee to maker, and consequently of money had and received by maker to the use of the holder, and of money paid by the holder to the use of the maker. That work cites C. J. Holt's judgment in *Clarke v. Martin*, (b) who recognized the method used before the statute of *Anne*, of declaring on a general *indebitatus assumpsit* for money lent, giving in evidence the promissory note. It does not seem to have been a necessary quality of such a note before the statute of *Anne* placed it within the custom of merchants, that it should be payable at all events. [*Bayley*, B.—The instrument called a promissory note had, *per se*, no binding effect *as such*, before the statute; since which it is held, that it must be payable at all events. (c)] Considering promissory notes as they existed before the statute, viz. as memorandums of money lent, it appears from *Bishop v. Young*, and *Potter v. Pearson*, (d) that the reason why a general *indebitatus assumpsit* would not lie on a note as such

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(a) 4th Ed. 366.

(b) Lord Raym. 756. 1 Salk. 129. S. C.

(c) See *Clark v. Martin*, supra. *Bayley on Bills*, 12.

(d) Lord Raym. 759.

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before the statute of *Anne* brought it within the custom of merchants, relating to bills of exchange, was, that it was *nudum pactum*, as binding a man to pay money without a consideration apparent. But the words here, "value received," import a consideration received in money, till the contrary is shewn, interest being specially reserved; and if the decision in *Bishop v. Young*, that debt lies by payee against maker of a promissory note expressed to be for value received in goods, is correct, debt would have lain on this instrument before the statute; for in that first stage of promissory notes, as the subject matter of consideration did not appear on the face of them, it might be for money lent or other matter. In *Clark v. Martin*, a count for money lent was supported before the statute by proof of a note promising to pay, and thus admitting the receipt of payee's money by defendant as maker.

BAYLEY, B. The consideration stated in the first special count, is money lent by the plaintiffs to the defendant, and being so alleged, it was incumbent on the plaintiff to make out affirmatively in evidence that that was the actual consideration. Therefore, if on looking at the instrument declared on, it appears that some other consideration for it might have existed, then, in absence of proof of any money lent as alleged, the plaintiffs cannot support this action. If the instrument does not support the special count, then there is no evidence on the count for money lent, nor on the last count which alleges that the defendant accounted with the plaintiffs, of and concerning divers sums of money *before that time*, and then due and owing from the defendant to the plaintiffs. For if no such accounting concerning money took place within six years, the plaintiff cannot maintain that count after the statute of limitations pleaded. If this had been an ordinary promissory note to pay

at all events, I should have agreed with the opinion of Lord *Holt*, in the case in Lord *Raymond*, cited by Mr. *Evans*, and with the dictum of Lord *Mansfield* in another case (*a*), that a note is *prima facie* evidence of money lent by payee to maker; but as this sum is only payable at the end of nine years, in the event of the return of *David Morgan* not taking place, or the certificate of his death in the interim, the presumption that the security was given for money lent does not arise; for the borrower of money is bound to repay at all events; but no provision was here made for any payment at all if *David Morgan* had returned within the nine years. Nor do the words "value received" necessarily import that money was lent as alleged, as value might have passed in various other ways not expressed. But the contingency on which the promise to pay turns, shows me satisfactorily that no money was lent by the plaintiffs to the defendant out of their own funds, for if the hypothesis as to the origin of this transaction, suggested in support of the rule, could be acted on by the court, without proof of the facts, the observation would occur, that no provision is made for the return of the money to *David Morgan's* representatives. Another state of facts might be supposed as founding this instrument, viz. that a debt being due to the plaintiffs from their brother *David Morgan*, they, in his absence, sold the estate in which he by his father's will had a beneficial interest, and suffered *David's* share of the purchase money to remain in the defendant's hands as purchaser, on receiving from him this acknowledgement of debt, in order to enable them to pay themselves the debt owing by *David*, by taking out administration to his effects if he should not return. Now if this latter suggestion is merely possible, we cannot say affirmatively that this is evidence of a

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(a) *Semble Grant v. Vaughan*, 4 Barr. 1525. And see 12 Mod. 890.

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loan of the money of the plaintiffs by them to the defendant, or of an account stated by him with them of money so lent, even if the statute of limitations had not been pleaded. In the absence of all evidence to justify a judge to leave this case to a jury, or for a jury to find a verdict upon, the nonsuit was proper.

GARROW, B. concurred.

VAUGHAN, B.—The only evidence in support of any count in the declaration was this instrument, with the rumour incident to *David Morgan's* long absence, and the want of knowledge that he had ever returned to *England*. The instrument does not on the face of it afford evidence of the loan of money alleged in the first special count, and without further adverting to the cases where between the original parties a promissory note is presumptive evidence of money lent, it is sufficient to say, that such a presumption only arises in the case of a note payable in the ordinary way, that is, at all events, and is therefore rebutted by any matter on the face of the instrument, which raises a directly contrary inference.

BOLLAND, B.—This instrument appears to have been originally a promissory note within the statute of *Anne*, but its character as such has been destroyed by the introduction of a contingency to control its payment (a). Then if it is not a promissory note, it was

(a) Had it remained a promissory note within the custom of merchants and the statute of *Anne*, a new stamp would have been requisite after the alteration. See Bayley on Bills, 89, 4 Ed. This would, in practice, amount to a necessity for making a new note on a properly stamped paper; for 24 Geo. 3. c. 32. and 37 Geo. 3. c. 136. s. 4. authorizing notes, bills, &c. to be stamped after made or drawn, on payment of a penalty, are long since

with propriety declared on specially. But there is no evidence of money having been lent so as to support that consideration as laid. The words "value received" which it has been contended import that consideration, have a meaning in bills and notes which flow from the custom of merchants, different from that which they bear when occurring in other instruments subject to the construction of law only. As to this instrument being evidence on the common counts (a); the case of *Bishop v. Young* only shows that debt lies on an ordinary promissory note by payee against maker, where value appeared on the face of it to have been received in goods; and it had been held previously (b) that debt would lie by the payee against the drawer of a bill expressed to be for value received. But the form of a promissory note has not varied since the statute of *Anne*, and as it appears from the argument in *Pearson v. Garrett* (c), that promissory notes were, before that act, sent into the world and negotiated by the custom of merchants, they were then, as now, only admissible in evidence on the common counts, when payable at all events, and put in suit between the original parties; and it is only to such notes that the decision in *Bishop v. Young* applies.

Rule discharged.

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expired, and 31 Geo. 3. c. 25. s. 19. against stamping paper after any note or bill written thereon, is still in force. The above instrument was stamped in two places with a promissory note stamp and an agreement stamp: the first was equally requisite by the stamp act 55 Geo. 3. c. 184. schedule tit. Promissory Note, whether the instrument is a promissory note payable at all events or on a contingency only. No point was taken as to the stamps at the trial.

(a) Which will not lie but where debt does, *Bovey v. Castleman*, Lord Raym. 69. *Butcher v. Andrews*, Salk 28. 2 Lev. 153. See 2 B. Moore, 420.

(b) *Hodges v. Steward*, Skin. Rep. 346.

(c) *Comberbach*, 227. 4 Mod. 242.

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Nov. 25th.

JONES, Gent, one, &c. v. SIMPSON, Esq. and
DARBISHIRE.

In an action against a magistrate for an act done in the execution of his office, the notice stated the nature of the writ intended to be sued out, and also the cause of action. A writ was sued out and served, but afterwards discontinued, and within the time allowed by the statute, another writ *ejusdem generis* was sued out and served in which another person was joined as defendant.

The Court after verdict held that the notice was sufficient.

THIS was an action of trespass and false imprisonment. The defendant, *Simpson*, was a magistrate of the county of *Stafford*, and *Darbishire* a constable. At the trial before *Allan Park, J.* at the last assizes for *Staffordshire*, the plaintiff had a verdict against both defendants, subject to a motion to enter a nonsuit on the following points, taken at the trial, and reserved by the learned Judge. — The plaintiff produced the copy of a notice of intended process against defendant *Simpson*, dated, and served on him, 30th *April* 1829, by which it was stated that plaintiff (who was an attorney), would in one calendar month issue a *quo minus* against the defendant *Simpson*, for trespass and false imprisonment, at suit of, and signed by the plaintiff. No other person was mentioned in the notice as intended to be made a defendant. It was objected by the defendant's counsel, that such a notice of intended writ or process against one, was not a sufficient notice within 24 Geo. 2. c. 44. s. 1. to the defendant *Simpson*, of the intended writ or process against him and *Darbishire*. Two writs of *quo minus* appeared to have been given in evidence; the first sued out on the 3d *June* 1829, against *Simpson* alone, a copy of which was served on him, and afterwards discontinued; the second sued out on 2d *July*, against both defendants, served on both, and relied on in evidence by plaintiff in support of the action. It was objected by defendant's counsel that the second writ had not been preceded by a sufficient notice of the intended writ within the above statute.

W. E. Taunton, on 10th November, moved for a rule nisi to enter a nonsuit on the above grounds. On the first point he cited *Lovelace v. Curry*, (a) urging that the defendant *Simpson*, on receiving notice of process against him, was not bound to contemplate the joinder of *Darbishire*, and might, therefore, have omitted to tender amends, in pursuance of section 2 of 24 Geo. 2. c. 44. within the calendar month specified in the notice, from his knowledge that the evidence of the constable *Darbishire*, would furnish him a defence, before the discovery that he was converted into a defendant. He distinguished *Agar v. Morgan*, (b) as turning on the words of a local canal act, which differed from those of 24 Geo. 2. c. 44., and said that *Bar v. Jones* (c) which arose on the latter act, was decided on the authority of *Agar v. Morgan*.

On the second point, he contended that after the defendant *Simpson* had been misled by the notice of process against himself, and had consequently omitted to tender amends within the calendar month specified in the notice, he could not safely pay money into Court, on the second writ after action brought pursuant to section 4 of the statute. He asked on which of the two writs defendant *Simpson* could have paid money into Court under that section after the month specified in the notice had elapsed? Consistently with the notice he received, he must have thought the first writ to be that on which the action would be brought, and would not tender amends within the calendar month, relying on *Darbishire's* evidence. The service of the first writ rendered the notice *functus officio*, and the writ against the two defendants was not preceded by a legal notice of action.

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(a) 7 T. R. 631.

(b) 2 Price, 120.

(c) 5 Price, 168.

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The Court granted a rule, against which

Phillips and Whitcombe, (*Campbell* with them) now shewed cause.—Mr. *Taunton* at the trial, alluded to *Danbury v. Cooper*, (a) as to the nature of the assault, but no question arises on that case. The objection here is, that the notice is equivocal, as varying from the writ afterwards sued out in the present action. But as it does not in express terms state that the action will be brought against the magistrate alone, the plaintiff was not *precluded* by it from suing the magistrate and constable together. Then has the defendant had the “notice in writing,” which was intended by the legislature, of the “intended writ or process” against him? That must depend on the wording of the statute, and on the nature of actions of tort. This statute was made to introduce a strictness of form in favour of justices, but does not require the form or nature of the action to be stated in the notice. *Lovelace v. Curry*. (c) The magistrate then has been informed that an action of trespass and false imprisonment will be brought against him, and no mistake of the object of the notice has been induced on the part of the defendant *Simpson*, for it gave notice of an action against him only; and the torts, though alleged against *Simpson* and *Darbshire*, are separate as well as joint, so that either defendant might have been acquitted (c). *Agar v. Morgan* turned on the words of the Regent’s canal act which required a notice in writing of the intended *action*, a like notice of the intended *writ* or process being required by this statute. On the former words it was held, that a separate notice to each of the several persons intended to be sued in trespass would

(a) 10 B. & C. 238.

(b) *Sabin v. De Bourgh*, 2 Campb. 196; it only requires the intended writ or process and the cause of action.

(c) 2 Saund. 117. n.

support a joint action of trespass against all, though none of the other persons afterwards joined in the action were named in the notice. Then, if separate notices of action, separately directed to *A.* and *B.* sufficiently describe a joint action in tort against *A.* and *B.*, notice of intended process against *A.* properly describes process subsequently sued out against *A.* and *B.*, within 24 Geo. 2. c. 44. in an action of a like nature. The same difficulties arose in *Agar v. Morgan* as in this case, but in a more specious form, as the information required to be given to a defendant was, under the words of that local act, much less considerable. But *Richards* B. expressly states as a material guide to his judgment, that a constable may be joined in an action against a justice of peace, though the intention of so joining him is not expressed in the notice. The other judgments are the same in principle; and *Wood* B. says that the words, "I give you notice that I shall commence an action against you," are sufficiently explicit, and may mean either alone or with others; but that the non-joinder of others could not be pleaded in abatement. *Bax v. Jones* is an express authority against the present rule, having been decided on 24 G. 2. c. 44., and the judgment in *Agar v. Morgan* was there fully re-considered by the same judges, and affirmed. In *Robson v. Spearman*, (*a*) a rule for a nonsuit was refused, though this point was urged in support of the motion. (*b*)

As the fact that two writs were given in evidence, was at this time disputed by the plaintiff's counsel, and did not appear on the report, no argument was pressed upon the second point. However, before delivering judgment, the Court on inquiry ascertained from the learned Judge, that this evidence had in fact been given.

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(*a*) 3 B. & A. 493.

(*b*) *Jones v. Bird*, 5 B. & A. 837, was also mentioned.

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W. E. Taunton having been raised to the rank of a Judge of the Court of King's Bench since obtaining the rule,

Russel Serjt. and *R. V. Richards* now supported it.— The notice served on 30th *April*, followed up by the writ of 3d *June*, applied itself to that writ, and was then *functus officio*, so that the magistrate might consider that notice at an end, and the first writ abandoned. [*Bayley, B.* Assuming two writs to have been proved, one issued in *June* and the other in *July*, then, if the defendants had relied on the abandonment of the first, it would have been a question for the jury, whether that writ was abandoned, and whether the second writ was sued out for any other cause of action than that mentioned in the notice.] Up to the time of discontinuing the first writ, the magistrate had time to tender amends, but his situation was changed after that time. For by the statute a magistrate is completely protected if he tender sufficient amends within the month; 2dly, he may tender amends after the month, and before action brought; 3dly, he may pay money into court under s. 4. after action brought, but before issue joined. In neither of which latter cases is he completely justified after discontinuance of the first writ. A magistrate is entitled to be kept aware of impending process from the time of giving the notice up to issue joined in the action; but in this case there was an interval between the discontinuance of the first writ and the commencement of the action, when he was not so aware. The words of the statute are prohibitory,—“no writ shall be issued out” till notice is given as directed, and when once that notice is given, can it be said that several writs may be sued out at pleasure, without a distinct notice applicable to each? Had a second notice of process been given after discontinuance, the magistrate might

have tendered amends on apprehending that his witness would be made a defendant. On the other point the "intended writ or process" is not here truly described in the notice. The case of *Bar v. Jones* was decided entirely on the authority of *Agar v. Morland*, but the words of the acts are very different. If this notice can cover two writs, it may equally cover any number. Had the writ been against one, plaintiff could not have declared against two; therefore this notice of process against one, does not duly precede the action against two. [*Bayley B.*—Then your writ would in this court have contained the names of two persons, the defendant and *Richard Roe*, as was the case in the King's Bench till lately (a).]

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Cur. adv. vult.

BAYLEY B. now delivered his judgment.—We deferred giving judgment in this case, not on account of its difficulty, but from our wish to confer with the learned Judge who tried the cause, as to the fact of the production in evidence of more than one writ. It turns out that copies of two writs were produced at the trial; but we are of opinion that the existence of the second writ makes no substantial difference; but believing the point spoken to at the bar by the counsel in support of the rule to arise on the facts as now ascertained, we shall give our judgment on it. The question is, whether under 24 Geo. 2. c. 44. s. 1. (a), the plaintiff is confined to the writ which he thinks fit first to sue out after notice

(a) See *Hendry v. Spencer*, cited 1 T. R. 238, and 4 Taunt. 14. See now Reg. Gen. 8 Geo. 4. K.B. Tidd. 9 Ed. 148.

(b) Enacting "that no writ shall be sued out against, nor any copy of any process at the suit of a subject, shall be served on any justice of peace for any thing by him done in the execution of his office, until notice in writing

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given, or whether, if dissatisfied with that writ, he is entitled to sue out and act on another, *ejusdem generis*, disclosing a like cause of action. And we are of opinion that he is so entitled.

Looking at the terms of the act and its object, the words "intended writ or process," indicate such a writ or process as corresponds in quality and character with that specified in the notice, and do not confine a plaintiff to an individual writ, but to such a writ as is so specified, and which, therefore, applies to a similar cause of action. The object of the act is, to give an opportunity to a magistrate to tender sufficient amends before suing out the writ, or after that step, to pay money into Court before issue joined. Nor is he prejudiced by a plaintiff's allowing the first writ to be discontinued, and a second to be sued out, for he has a second opportunity to make a satisfactory tender, and receives a benefit accordingly. A court must so interpret statutes, which restrain the general right of the subject to sue, as not to tie themselves down by the wording beyond the spirit of the provision; and accordingly, it would be a narrow construction of this act to hold, that the notice only applies to the writ first sued out. To draw arguments from technical reasoning to defeat the plaintiff's general right of action, is not the species of protection intended for magistrates by the legislature, by provisions unquestionably salutary as directed against vexatious actions. Then, in this case, though a former *quo minus* has issued, you may properly predicate the second to be

of such intended writ or process shall have been delivered to him or left at the usual place of his abode, by the attorney or agent for the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving of the same, in which notice shall be clearly and explicitly contained the cause of action which such party hath, or claims to have against such justice of the peace."

a proper writ, and such a writ as the plaintiff might intend to sue out when the notice was given.

On the other point, whether after giving notice to a justice of an intended writ against him, a writ may be sued out against him *and* another, that law has been settled in *Agar v. Morgan*, and *Bar v. Jones*, and is not fit to be agitated again. The case of *Agar v. Morgan*, is undistinguishable in principle from the present. It decided, that a notice of *action* against a man, delivered to him pursuant to a statute, would support a subsequent action of trespass against him *and others* for a joint trespass; now, if a writ against a justice and another is not within a notice of a *writ* against the justice, then the notice in that case would not have been a notice of *action* against the party as there sued with others. But it was there held to be a good notice of such an action, and though the case turned on another act, yet the Court adopted the illustration of the counsel, who compared it to the corresponding enactments of 24 Geo. 2. c. 44. The case of *Bar v. Jones*, expressly turns on this act. *Agar v. Morgan*, was there reconsidered by the same Judges, and its principle solemnly recognized. This point was mentioned in the King's Bench in *Robson v. Spearman*, in support of the rule there moved for, and though the report does not mention the holding of the Court upon it, yet it is not the habit of that tribunal to pass by a point moved, when essential to the decision of a case before them, and I entertain no doubt but that it was duly weighed as an ingredient in their resolution. Their refusal of the motion must, therefore, be considered as conveying an opinion adverse to this argument in support of it. This rule must therefore be discharged.

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GARROW B.—In the case of *Bar v. Jones*, the former decision in *Agar v. Morgan* was reviewed by the same judges, with an attention directed to that different word-

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ing of the acts on which stress has been laid to-day in support of this rule, and their decision should not be disturbed ; nor, were the question *res integra*, should I have come to a different conclusion.

VAUGHAN B.—The question here is, whether the act of 24 Geo. 2. c. 44. has been complied with. It requires the notice of process to be served, and the cause of action to be explicitly stated. It would be a refinement in construction in favour of the magistrate, hardly founded on good sense, to hold that he has not, in this case, received sufficient information of intended process, and of the nature of the action about to be brought against him, so as to have enabled him to have tendered amends had he thought proper. Had a notice been given of a writ intended against him and the constable, and before the action was commenced, the latter had shewn his warrant; can it be said, that the plaintiff was bound to proceed against him in pursuance of the notice? The terms of the act have been complied with, and this notice gives all the information intended to be communicated to a public functionary of this description, by explicitly stating the cause of action. As to the suggestion, that the magistrate is kept in ignorance whether he is to be proceeded against jointly or severally; the terms of the notice do not import a sole or several action, while it might be seen from the form of declaration against two, to which of these writs the notice was intended to apply. It is not alleged that the cause of action is not truly stated in the notice. Though the decision on a similar objection in *Robson v. Spearman*, is not directly reported; yet part of the point there made, in conjunction with the present, viz. the omission to mention a battery in the notice, is distinctly mentioned as answered by the Court.

BOLLAND B.—This point must have been considered in *Robson v. Spearman*, though not perhaps mentioned by the Court in a shape to be noticed by the reporter. This rule was granted on the statement, that *Agar v. Morgan* was decided on another act, and that *Bar v. Jones*, though arising on this act, followed that decision on reasoning only applicable to the particular provisions of the other act.

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Rule discharged.

The ATTORNEY GENERAL v. SIDDON and BINNS.

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INFORMATION for penalties. The second count was for harbouring and concealing smuggled tobacco. (a) The seventh was framed on 57 Geo. 3. c. 123. s. 13. (b) A master is answerable for the illegal act of his servant, if within the scope of his probable authority and done for the master's benefit. Thus, where after the detection of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit, by which he intended to protect the goods from seizure, the master was held liable for the penalty attached to the offence of unduly using a permit.

(a) See 29 Geo. 3. c. 68. ss. 109. 153.

(b) Enacting, that every person or persons who shall lend, deliver, or employ, or make use of, or cause, or suffer any permit granted under any law or laws of excise, to be sold, lent, delivered, employed, or made use of, to or for any other use or purpose whatsoever, than to accompany the actual removal of the goods for which the same was obtained and granted, and which shall be therein expressed or described, or shall produce, or cause or suffer the same to be produced, to any officer or other person, as having been received with any goods, other than as aforesaid, or shall in any manner use or employ, or suffer to be used or employed, any permit, so as that any account kept or checked, or to be kept or checked, by the officer or officers of excise by such permit, shall or may be frustrated or avoided; he, she, or they shall for every such offence severally forfeit and lose the sum of 500*l.* over and above all other penalty and penalties, forfeiture and forfeitures

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charging defendants, as dealers in tobacco, with using an excise permit for another purpose than that of accompanying the actual removal of the goods for which it was granted, and which were therein expressed. The following facts were proved at the trial before the Lord Chief Baron at the Exchequer Sittings. On 15th *June* 1829, the defendants were in partnership as tobacco manufacturers, though only *Binns's* name was on the door. The last *bonâ fide* permit granted for taking tobacco into their stock was dated that day. On the 16th the surveying officers found concealed in a dark cellar on their premises 40 lbs. of smuggled tobacco, in two packages of 20 lbs. each. (a) They asked for both defendants by their names, but they were absent from home. They asked for the permit, under which the tobacco had been brought on the premises. *Chote*, the shopman, said he thought there was one, and after some search produced the permit, dated the 15th; but it was for cut tobacco and did not apply. The officers remained on the premises, and while they were there, a boy was sent by the shopman to a neighbouring tobacco dealer for a request note, in order to get a permit thereon (b) for 40 lbs. of tobacco, in two equal packages.

whatsoever, and every permit used for any purpose whatsoever other than to accompany the removal of the spirits or goods respectively for which it was obtained and granted, and which shall be therein expressed or described, shall be deemed and taken to be a false permit, and such use shall, over and above all other penalties and forfeitures, subject the person or persons so using the same to all and every the penalties and forfeitures imposed by law upon any person or persons for using, giving or receiving any false permit.

(a) Tobacco is prohibited to be imported, except in hogsheads, &c. of 100lbs. if from the *East Indies*, or 450lbs. if from any other place, and must not, in general, be packed in bags or packages within such hogshead, &c. except from *Turkey*. 6 Geo. 4. c. 106. s. 52, Schedule. And see *Attorney-General v. Bell*, *infra*.

(b) See in general as to permits, 1 Chitt. Commerc. Law, 843. and as to permits for tobacco, 29 Geo. 3. c. 68. sections 111, and 113.

A permit was accordingly obtained, and brought back by the boy to *Chote*, who after pretending to make further search, at last suddenly produced the permit which had been thus obtained, but which on examination bore date the exact hour it was issued, viz. after the discovery of the smuggled tobacco by the officers.

The defendant *Binns* suffered judgment by default, and the jury found a verdict for the crown against *Siddon* on the second and seventh counts. *Jervis* afterwards obtained a rule for entering such verdict on the second count only, or for a new trial, on the ground that the act of the shopman in procuring the permit, was not such an act in the course of trade as bound the master.

Clarke and *Walton* now shewed cause.—If the absence of the master under these circumstances should be held to protect him from responsibility for the acts of the servant in the advancement of the master's business, the revenue laws will become wholly ineffectual. The act of procuring the permit was intended for the master's benefit; for on the discovery of the smuggled tobacco by the officers, it was material to shew if possible that it had been placed on the premises in a legal manner, so as to save it from seizure. *Chote*, the shopman, must be taken to have been concerned with the defendants in carrying on an illegal business for their benefit, and to have acted under their general authority in getting this accommodation permit, for protecting their property from the consequences of infringing the revenue laws. Now whether an absent master is answerable criminally for every act of his servant in his employ short of felony, (a) is not here the question; for the defendant is here only charged *civiliter*, viz. for a penalty which by the judgment becomes a debt to the crown. This case does not go so far as that of an

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(a) See Doctor and Student, Dial. II. cap. 42. 16th Ed. p. 235.

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information for a misdemeanor in publishing a libel in a newspaper, where, however, the proprietor residing at a distance from the place of publication has been held criminally responsible for libels inserted in it without his knowledge by the party to whom he entrusted the conduct of its publication. (a) It was there held that such a general authority to carry on the concern for the profit of the proprietor, supported the allegation that the proprietor, "*knowingly* and unlawfully *caused* to be published," the libel in question. In another information of a similar nature against the same parties, the same law was again stated by Lord *Tenterden*, who added, that a possible case might occur in which the proprietor might be exempt. So here the presumption arising from the *primâ facie* evidence of the servant's employment by the defendants might have been rebutted, and their exemption from liability established, by calling the shopman to prove, that no illegal act of his had ever been authorised or countenanced by them in the carrying on their business, and that the transaction in question was on his own account, and unconnected with his employment by them. (b) In *Michael v. Allestree*, (c) where a servant brought horses into a frequented place in *London*, to break them for a carriage, and an accident happened from their unruliness, the master, though absent, was held liable, and it was intended that he sent the servant to train the horses there. In *Stephens v. Elwall*, (d) the master was in *America*, but a sale by the defendant, his clerk, who carried on the business of his house of trade in *London* for his master's benefit, was held a sale as well by the master as the servant, so as to establish a conversion by both. The rule *respondeat su-*

(a) *Rex v. Gutch*, and others, M. & M. 433. 437.

(b) See Bac. Ab. Master and Servant, (L).

(c) 2 Levinz. 172. 1 Vent. 295. 3 Keble, 650. S. C.

(d) 4 M. & S. 259.

perior was held to prevail in *Brown v. Compton*, (a) a case of great hardship. There a sheriff was held liable for an escape by the act of his gaoler in liberating an insolvent debtor under an order from justices in quarter sessions, it having afterwards turned out that they had no jurisdiction over the insolvent at that particular session.

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John Jervis, in support of the rule.—If the obtaining the permit was the act of the servant, without the authority of the master, express or implied, this rule must be absolute. Nor is the revenue unprotected in that event; for though the party may not be liable to a penalty, the remedy *in rem* by seizure remains. (b) Then, whether this be a criminal or civil proceeding, the master is only liable *civiliter* for a negligent or incautious act of his servant, done *in* his business, but not for a wilful act done by him out of it. For if a master command his servant to do what is lawful, and he misbehave himself or do more, the master shall not answer for his servant, but the servant for himself, for it was his own act; otherwise it would be in the power of every servant to subject his master to what actions or penalties he pleased. (c) Thus, if a landlord takes a distress, and his servant abuses it, (d) the former is not liable. [*Bayley B.*—That is an abuse of the distress, and not pursuant to the implied authority derived from the master. If I order a man to deceive another, and he exceeds his authority, I am still liable.] The conviction for concealing tobacco, on the second count, cannot be imported into the consideration of the seventh; but if it could, then, though the defendant might

(a) 8 T. R. 424.

(b) See 29 Geo. 3. c. 68. s. 23.

(c) Bac. Ab. tit. Master and Servant, (L). See *per* Lord Holt, *Middleton v. Fowler*, Salk. 282. Skinner, 625. S. C.

(d) 20 H. 7. 13 b. 21 H. 7. 23. cited Hardr. 31. See *Boucher v. Lawson*, Rep. t. H. 87.

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have authorized the shopman to conceal the tobacco in the cellar, it was not within the probable consequences of that order, that the servant should obtain the permit as here charged. (a) Nothing can be inferred from the circumstance that the shopman was not called by the defendants, for it was equally incumbent on the counsel for the crown, to have examined him, to prove the authority he actually received from the defendants. [*Bayley* B.—If this act is done by the servant, not to protect himself, but his master, the inference arises that he did it in furtherance of the authority received from him. In *Rex v. Dixon*, (b) a baker was indicted for delivering bread made of noxious materials for the use of the children of the Military Asylum. The bread was made by a servant, and the master knew that alum was used. That article is prohibited to be used in bread, (c) though not necessarily noxious, and even beneficial, if in proper solution. The master was held liable for the act of his servant in suffering it to remain in crude lumps in the bread, for it was his duty to take proper precautions to prevent its misuse. In *Grammar v. Nixon*, (d) a master was held liable for a false warranty by his apprentice of the fineness of an ingot.]—In *Rex v. Dixon* the master recognised the act of the servant by receiving the proceeds of the bread, so that he had an actual, and not a mere constructive knowledge of the transaction. The same observation applies to *Southern v. How*, (e) and there the jury having found that the master did not command the factor to conceal that the jewels were counterfeit, the Court inclined that the factor, by his general power to sell, should not charge

(a) See *Foster on Crown Law*, Disc. 3. Ch. 3. p. 369, 370.

(b) 3 M. & S. 11. 4 Camp. 12. S. C.

(c) 36 Geo. 3. c. 22. s. 3.

(d) *Str.* 653.

(e) *Cro. Jac.* 468. And see *Doctor and Student*, 16th Ed. 235. 237. *Strode v. Dyson*, 1 Smith's Rep. 400.

his master if he exceeded his power. *Harding v. Greening* (a) was an action for a libel contained in a letter written by the defendant's daughter; and proof that she was authorized by the defendant to make out his bills, and write his general letters of business, was held insufficient to charge him for her act, without evidence that the letter in question was written with his knowledge or procurement, or was recognized by him after it was written. [*Bayley B.*—If I send a horse to be sold without direction about warranting him, and my servant warrants him, I am liable. (b) In *Rex v. Bower*, (d) the Court never doubted the liability of the pawnbroker for the act of his servant, in selling a chain as gold, which was not genuine gold.]

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Clarke replied.

Cur. adv. vult.

ALEXANDER L. C. B.—This was an information for the penalties imposed by law for harbouring and concealing smuggled goods, and for using a permit for another purpose than that of accompanying the goods for which it was granted. I will state the evidence applicable to the 7th count. [Here the Chief Baron went through the evidence, and proceeded—] The breach of the act of parliament, which enacts that the permit shall accompany the goods for which it is granted, is clear; but the objection is, that the defendant *Siddon*,

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(a) 1 B. Moore, 477.

(b) *Alexander v. Gibson*, 2 Campb. 555, for the servant had an implied authority to warrant. And see *Helyear v. Hawke*, 5 Esp. 72. Cro. Jac. 471. *Secus*, if a person not a horsedealet sends a servant to a fair to sell a horse, and desires him not to warrant it. *Bank of Scotland v. Watson*, 1 Dow, 45.

(c) Cowper, 323. *Quere*, if in the principal case it was left to the jury to say whether the master gave a general authority to the servant to do the best he could to protect the property against the surveying officers.

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who was the master of the party who obtained this permit, did not appear to have taken a personal share in the transaction, and was not, therefore, liable in this proceeding for the act of his servant. I am of opinion, however, that on the evidence he was rightly convicted on the 7th count. On the 2d count, for harbouring and concealing these two packages of tobacco by smuggling, the only evidence was, that they were on the premises: now it was of daily occurrence to convict on such evidence, or the revenue laws would be entirely inoperative. If *prima facie* evidence of guilt is given, the presumption of guilt arises till rebutted by evidence to establish innocence; on the same principles our decision proceeds, that whatever a servant does in the course of and as part of the employ with which he is entrusted by his master, must be taken to be the act of his master, unless the contrary is shewn. This was admitted to be law in civil cases, though the contrary has been held in criminal cases; but even in the latter it has prevailed to a certain extent, as appears from the cases of *The King v. Dixon*, and *The King v. Gutch*. In the first case it was proved that alum, though prohibited by statute (a) to be used in the manufacture of bread, was not inevitably noxious—that the master had authorised it to be used, and though there was no evidence that he had extended that authority to the using it in any way which would be prejudicial, he was still held liable for its actual use in an unrestrained and noxious manner. The principle now contended for was not sustained in that case, and the laws would be altogether ineffectual, if it was not held that the master is liable for every act done by his servant in pursuance of the general purposes of his employment. Against the verdict it is argued, that this is a proceeding for an act of the ser-

(a) 36 Geo. 3. c. 22. s. 3.

vant purely criminal, and for which, therefore, the master could not be liable; while, on the other hand, this is contended to be a mere civil proceeding for a penalty, which is a debt due to the crown. If the decision of the Court should be other than that now pronounced, irresponsible persons would be set up by the parties benefited by fraudulent dealings, so as to avoid all claims under the revenue laws.

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BAYLEY B.—I am of the same opinion. This is not properly a criminal proceeding; but as a civil proceeding for the debt of the crown, it is penal in its nature, as are also informations for penalties on the statute of usury, or against a master for the giving unstamped receipts by his servant. Whether the information here is penal or civil in its nature, the act of the servant is by law to be considered as done by the master, if it is within the scope of the probable authority which must be considered to be given by the master to the servant, for the carrying on the business of the former. This is not the ordinary case of selling in the shop of the master the articles in which the master deals, for that being within the ordinary authority given by a master to a servant, is on that principle held to be the master's act, as in case of a sale by the servant of a libellous publication, *Rex v. Nutt* (a), *Rex v. Almon* (b), *Rex v. Gutch* and others (c)—nor was the illegal act, here made the subject of information, done in the course of manufacturing articles which the master in his way of business is to manufacture, for there the servant clearly acts within the scope he naturally receives from his master to manufacture the subjects

(a) Fitzgib. Rep. 47. 1 Barnard. 306. S. C.

(b) 5 Bar. 2686.

(c) Moody & M. 433. And see *R. v. Cuthell*, 5th Erskine's Speeches *R. v. Walker*, 3 Esp. 21. *Lamb's case*, 9 Coke, 59. Moore, 813. S. C.

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of the trade, and in such cases, therefore, the master is clearly liable. But the present act is of a different description, not being within the ordinary range of those acts of a servant, which have been held to be the master's. In order to form a judgment whether it is, or is not within the authority given, we must investigate its nature, and the participation of the master in any thing relating to it. The whole attending circumstances shew it to be that of a servant of a fraudulent master, attempting to conceal his master's offence, and to avert its consequences. From the nature of the whole transaction and the master's conduct, it must be inferred, that the servant had authority from his master not perhaps to do this particular act, but to do the best to frustrate the excise laws at the moment of embarrassment by the presence of the officers. For the master has on his premises goods, for possession of which he has no legal permit; the detection of this fact brings with it loss of character, and of property in the shape of a pecuniary penalty. The master, then, having full knowledge that such articles are on his premises, the authority he may naturally be expected to give to his servant in such a case is, "you know the hazardous business which is carrying on here, do what you can, or what is reasonable, to protect me from the penalties attached to it." Has the servant any purpose of his own to answer? None: he acts for his master at considerable personal risk of his own. For whose benefit? Certainly not for his own, for whether the goods are seized or not, is indifferent to him personally; but his master has a deep concern in their being protected by the servant's measures for that end; and it is clearly for the benefit of the master, to be shielded from the penalties of his illegal traffic, for while he sanctions the carrying it on, if the servant adopts means calculated to save the master and which can have no other object, the course so taken

by the servant must be taken to be in the service, and for the benefit of such a master, and to be within the authority probably given by him in such conjuncture. (a) In this case, there is *prima facie* evidence of such an authority in reference to acts of this description. The extent and nature of such authority must be judged of from the nature of the servant's employ, who in this case had the custody of this illegally obtained article. It was open to the master to rebut such *prima facie* evidence, and as that was not done, it was correctly left to the jury as being the act of the master.

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GARROW B.—I conducted the prosecution in *Rex v. Dixon*, which is decisive of this case. It was there proved that a certain quantity of alum in a proper state of solution may be mixed with bread without danger to the consumers; but it was held that if a master baker will introduce alum, he ought personally to secure its due dilution, and was answerable for the improper use of an article, which might, however, be innoxious in another form. (b) The distinction which might here exist between an act done by the servant in the ordinary course of a master's business, and this act of sending for the request note, was a question for the jury. If the two packages of tobacco were not brought into the stock for the benefit of the master, the servant might have been called to say, "I had the general superintendence of the warehouse, but took this article in on my individual account, I was unable to pay the penalties, so sent for the request note to shield myself from them." There is no doubt that this fraudulent act was done by connivance, or understanding with the master, not to hesitate at any thing likely to cover the illicit trade.

(a) See *Turberville v. Stamp*, Lord Raym. 264. confirmed in *Brucker v. Fromont*, 6 T. R. 661. and again (with *Michael v. Allestree*, 2 Lev. 172.) in *Leanne v. Bray*, 3 East, 601. by *Lawrence J.*

(b) See *Dixon v. Bell*, 1 Stark. C. N. P. 287.

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VAUGHAN B.—I concur in the opinions delivered. In order to bring the fraud charged within the penalty provided by the act, the jury must be satisfied that the master, the present defendant, used or caused the permit to be used for the purposes imputed either by himself, or a servant authorized to act for him under an express or implied, an actual or constructive authority. The manner in which this rule is drawn up shews, that the act of obtaining the permit was by the master's order; for his conviction for the improper harbouring and concealing the smuggled tobacco, charged in the second count, is admitted by him to be proper, and the jury are warranted in coming to the conclusion that the act was the act of the master, from the presumption reasonably arising that *this* act was authorized by him. For as he was not present at the time the permit was improperly used, nor at the time when these goods were deposited, his absence might cover the latter offence here admitted as well as the former. This is a penal and not a criminal proceeding.
Rule discharged.

Nov. 24th.

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Stat. 6 Geo. 4.
c. 107. pro-
vides by sec.
52. that cer-
tain spirits and
tobacco shall
be absolutely
prohibited to
be imported,
unless, if

THE Lord Chief Baron delivered judgment in this case which had been argued in a former term.

This was an information for penalties for harbouring and concealing smuggled goods, the first count of which stated that the defendant had harboured and concealed certain goods, liable to the payment of certain duties on spirits, in casks of not less than 40 gallons, or in cases of not less than 3 dozen quart bottles, and if tobacco, and from the *East Indies*, in hogsheads, &c. of 100lbs. and from other places, in hogsheads, &c. of 450lbs. each; and by sect. 128, that all such goods whose importation is thus restricted on account of the packages, shall be deemed prohibited goods;—A count stating that defendant imported spirits and tobacco in casks and cases of less than the legal size, and harboured and concealed the same *knowing no duties had been paid or secured thereon*, is bad, for prohibition of *such* import is absolute.

the importation thereof, which had then and there been imported and illegally unshipped, the duties not having been first paid or satisfied. The goods are stated to be 500lbs. of tobacco, 400 gallons of foreign brandy, and 400 gallons of foreign Geneva. The penalty demanded (the crown having exercised the option given to them by the act) is the treble value. There were several other counts; the jury found for the defendant on the issues gained on all the counts, except the first, and on that they found a special verdict to this effect, "That the said defendant on the day and year in the said first count of the said information in that behalf alleged, imported into the United Kingdom the said tobacco in the said first count mentioned, in packages containing 28lbs weight each and no more, and that the said defendant imported into the United Kingdom foreign brandy and foreign Geneva, in the said first count of the said information mentioned, in casks containing four gallons each and no more, and that the said tobacco, foreign brandy and foreign Geneva, in that count mentioned, were not imported into the United Kingdom to be legally deposited or warehoused for exportation, and that the said defendant did knowingly harbour, keep, and conceal, and did knowingly permit and suffer to be harboured, kept, and concealed the said goods in the said first count of the said information mentioned, at the same time and place in that behalf within mentioned, they the defendants at the said time, when they so harboured, kept and concealed the same goods, well knowing that the same had been imported and unshipped in manner and form aforesaid in this Kingdom, *without any duties thereon having been first paid or secured.*" There is no doubt therefore of the defendants harbouring and concealing run goods. The objection to this information and to the recovery by the crown is, that goods in the state in which these are represented in the special verdict to have been imported,

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are absolutely prohibited and forfeited, whereas the averment in the information is that they were liable to duties, and the offence stated is, the having imported them without having paid those duties. The provisions on this subject are contained in 6 Geo. 4. c. 107. and by section 52 of that act, certain goods are absolutely prohibited to be imported, or can be imported only under the restrictions mentioned in each table. The goods so restricted are described and specified in tables or lists which are found in the body of the act; among which are the following:—Certain spirits among which these are, unless in casks containing not less than 40 gallons, or in cases containing not less than three dozen reputed quart bottles. Then as to tobacco, the prohibition is absolute, except under the restrictions that it be imported, if from the East Indies, in hogsheads, casks, and chests, or cases of 100lbs weight; or 450lbs weight if from any other place. Then in the subsequent section 128, it is provided that all goods, the importation of, which is restricted on account of the packages, shall be deemed and taken to be prohibited goods. Now the information describes these goods which the act says shall be prohibited, as goods which may be imported on paying duty, and the complaint is that they have been imported without paying or securing the duty. It is said that the crown cannot know in what packages they were imported. This is true, *prima facie*, as they would be deemed imported in the packages in which they were found; but all difficulty would be obviated by inserting a double set of counts. There is some inconvenience in so doing and some expence, but we do not think that the objection arising from that expence and inconvenience, would warrant us in sustaining this conviction for one offence, upon an information charging another. Therefore we think there must be

Judgment for defendant.

IN THE EXCHEQUER CHAMBER.

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NEWBERRY and BENSON v. COLVIN and Others.

Nov. 13th.

(In Error from the King's Bench.)

Before TINDAL, L. C. J. — GASELEE, BOSANQUET,
and ALDERSON, Js. — GARROW, VAUGHAN, and
BOLLAND, Bs.

ACTION on the case against the defendants below, as owners of the ship *Benson*, for the loss of goods Where the owners of a ship, by an instrument

called a charter-party, appointed *B.* to the command, and agreed that (the ship being tight, &c., and manned with thirty-five men) *B.* should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden for account of the owners, and proceed therewith to *Calcutta*, and there re-load the ship with a cargo of *East India* produce, and return to *London*, and upon her arrival and discharge there, the intended voyage and service should end. And the owners further agreed, that the complement of thirty-five men should, if possible, be kept up; that they would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage. In consideration of which *B.* agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owners for the use and hire of the ship after the rate of 25s. per ton per month, of which 1000*l.* was to be paid on the execution of the charter-party, and 2000*l.* by two approved bills on *Calcutta*, one of which was to be payable one month, and the other two months after her arrival there; the residue to be paid or secured to the satisfaction of the owners on the arrival of the ship at *London*, and previous to commencing the discharge of her homeward cargo. (Certain other stipulations for payment of freight, if the ship were detained in *India*, were then made.) And it was further agreed, that *B.* should remit all freight-bills for the homeward cargo to *Buckles and Co.* in *London*, who should hold them as joint trustees for the owners and *B.*; that they should first be applied to payment of the balance of freight due from *B.*, and the surplus, if any, be handed over to him. It was then provided, that the owners should have an agent on board, who was to have the sole management of the ship's stores, and power to displace *B.* for breach of any covenant in the charter-party, and appoint another commander. *C. and Co.*, in *Calcutta*, having knowledge of this instrument, shipped goods on board the vessel for *London*, which were never delivered there. Held that they could not recover against the owners, for by the agreement between them and *B.* he became owner *pro hac vice* on three grounds. 1st. He was to take the ship into his service for twelve months, at a certain rate per ton. 2dly. Had the owner's agent displaced him from the command, he would have remained the freighter liable to the shippers; and lastly, the surplus freight belonged to him and not to the owners, who had a remedy on the charter-party if no freight had been earned.

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shipped by the plaintiffs below in *India* to be conveyed to *England*. The first count alleged, that the defendants below before and on the 11th day of *March*, 1817, were owners of the *Benson*, whereof one *George Betham* then was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river *Hooghly*, in the *East Indies*, and bound on a voyage from thence to the port of *London*; and that the defendants so being owners of the ship or vessel as aforesaid, the plaintiffs heretofore, to wit, on, &c., in the river *Hooghly* sforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board of the said ship or vessel, whereof the said *George Betham* then was master, and which said ship or vessel was then riding at anchor in the river *Hooghly* aforesaid, divers goods and merchandize, to wit, 2171 bags of sugar, and 191 chests of indigo of them the plaintiffs, then being in good order and well conditioned, and of a large value. to wit, of the value of 20,000*l.* of lawful money of *Great Britain*, to be taken care of, and safely and securely carried and conveyed in and on board of the said ship or vessel from the river *Hooghly* aforesaid to the port of *London* aforesaid; and there, to wit, at the port of *London* aforesaid, to be safely and securely delivered in the like good order, and well conditioned, to certain persons, commonly called and known by the names, and using the style and firm of Messrs. *Bazett, Farquhar, Crawford*, and Company, or to their assigns, (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted,) for certain freight and reward, payable by bills in that behalf; and, although the said goods and merchandizes were then and there had and received by the said *George Betham*, so being master of the said ship or vessel as aforesaid, in and on board of the said ship or vessel in the river

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Hooghly aforesaid, to be carried, conveyed, and delivered as aforesaid; yet the defendants, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, and wrongfully and unjustly intending to injure the plaintiffs in this behalf, did not, nor would, take care of, and safely or securely carry or convey the said goods and merchandizes, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river *Hooghly* aforesaid to the port of *London* aforesaid, nor there, to wit, at the port of *London* aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. *Bazett, Farquhar, Crawford*, and Company, or to their assigns, although the defendants were not prevented from so doing by the act of God, the King's enemies, fire, or other dangers or accidents of the seas, rivers, or navigation of any nature or kind soever; but, on the contrary thereof, they, the defendants, so being owners of the said ship or vessel as aforesaid, so improperly behaved and conducted themselves with respect to the said goods and merchandizes, that by and through the mere carelessness, negligence, misconduct, and default of the defendants, and their servants, in this behalf, a great part of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of the like lawful money, became and was wholly lost to the plaintiffs below; and, also, thereby the residue of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was greatly damaged, lessened in value, and spoiled, and the plaintiffs below lost and were deprived of divers great gains and profits which might and would otherwise have arisen and accrued to them from the sale thereof, to wit, at *London* aforesaid. *Plea*, not guilty.

At the trial before Lord *Tenterden* C. J., at the *London*

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sittings after *Michaelmas* term, 1826, a special verdict was found as to the promises in the first count of the declaration mentioned, in substance as follows:—On the 11th *March*, in the year of our Lord 1817, the plaintiffs below shipped on board the ship *Benson*, near *Calcutta*, in the *East Indies*, then riding at anchor in the river *Hooghly*, 2171 bags of sugar, and 191 chests of indigo, then being in good order, and well conditioned, for which the following *Bill of lading* was signed by *George Betham*, then being the master of the said ship, under the circumstances hereinafter mentioned: “Shipped by the grace of God, in good order and well conditioned, by Messrs. *Colvins, Bazett*, and Company, in and upon the good ship called the *Benson*, whereof is master, under God, for this present voyage, *George Betham*, and now riding at anchor in the river *Hooghly*, and by God’s grace bound for *London*, that is to say, 2171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of *London*, the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto Messrs. *Bazett, Farquhar, Crawford*, and Company, or to their assigns; freight for the said goods being paid by bills.” *G. Betham* received the said goods on board the said ship in the river *Hooghly*, to be carried and conveyed according to the bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time the defendants below were the owners of the said ship, and before the said ship sailed to the *East Indies*, and whilst they were such owners, the following *Charter-party*, bearing date the 7th day of *June*, in the year of our Lord 1816, was executed by the defendant below *Thomas Sterling Benson*, who was then the managing

owner of the said ship, and acting on behalf of himself and the other owner of the ship on the one part, and *G. Betham*, of the other part, for the said ship *Benson*.

“ This Charter-party of Affreightment, made and concluded in *London* the 7th day of *June*, in the year of our Lord 1816, between *Thomas Sterling Benson*, of the city of *London*, part owner of the good ship or vessel called the *Benson*, of 573 tons measurement, or thereabouts, now lying in the port of *London*, of the one part; and *George Betham*, of the city of *London*, merchant and mariner, freighter of the said ship, of the other part; Witnesseth, that the said owner, for the considerations hereinafter mentioned, doth hereby promise and agree to and with *George Betham*, his executors, administrators and assigns, that he *G. Betham* shall have, and he is hereby accordingly appointed to, the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso or condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners. And the said ship being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in the merchant's service, and for the voyage and service hereinafter mentioned, and being also manned with thirty-five men and boys, the said commander included, he the said *George Betham* shall be at liberty, and he is hereby allowed and permitted to receive, take, and load on board the said ship, in the port of *London*, all such lawful goods, wares, or merchandize as he may think proper to ship, not exceeding in the whole what the said ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for 100 tons of goods to be laden by or for account of the said owner as hereinafter is mentioned. And the said ship being so laden, he *G. Betham* shall and will set sail therewith and pro-

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ceed to *Calcutta* in the *East Indies*, with liberty to touch at *Madeira* and *Madras* in her outward passage; and being arrived at *Calcutta* aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of *East India* produce, and return with the same to the port of *London*, and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be completed, the act of God, the King's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of what nature or kind so ever excepted. And the said owner doth hereby further promise and agree to and with *G. Betham*, his executors, &c. that in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert, or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then and in every such event happening, the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expence of the said owner. And further, that the said ship shall at all times during her said intended voyage and service be furnished and provided with proper and sufficient stores, provisions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid for and during the term of twelve calendar months, to be accounted from the twelfth day of the present month of *June*, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of *London*, being finally discharged of her homeward cargo, and cleared by the revenue officers. And the said owner doth also promise and agree, that the said ship shall, previous to her departure from the port of *London* on her above-mentioned voyage, be furnished and provided

with good water casks, capable of containing eighteen tons of water, and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, at and after the rate of fourteen pence for every passenger or servant per lunar month, and so in proportion for a less period. In consideration whereof, and of every thing above mentioned, he, *G. Betham*, doth hereby promise and agree to and with the said *Thomas Sterling Benson*, in manner and form following, that is to say, that he, *G. Betham*, shall and will take upon himself the command of the said ship for and during her said intended voyage, and until her return to the port of *London*, and shall and will navigate her to the best and utmost of his skill and ability; and, also, that he, *G. Betham*, shall and will accept, receive, and *take the said ship into his service* for and during the term or space of twelve calendar months certain, to commence and be accounted from the twelfth day of the present month of *June*, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to and final clearance in the port of *London* aforesaid. And, further, that he shall and will well and truly pay or cause to be paid unto the said owner freight for the *use or hire* of the said ship, at and after the rate of 25s. per ton, register measurement of the said ship, per calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to the port of *London*, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following: that is to say,

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the sum of 1000*l.*, part thereof, at or before the execution of these presents; the sum of 2000*l.*, further part thereof, by approved bill or bills to be drawn in *London* upon *Calcutta*, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof at two calendar months next after the ship shall arrive at *Calcutta*, and the residue and remainder of such freight to be paid or secured to the satisfaction of the said owner, upon the arrival of the ship in the port of *London*, and previous to commencing the discharge of her homeward cargo: Provided always, that in case the said ship shall be kept or detained at *Calcutta* aforesaid more than ninety days, then and in such case the said *George Betham* doth hereby engage to pay or cause to be paid at *Calcutta* aforesaid, to the agent of the said owner, the sum of 1000*l.*, either in cash or by bills to be approved of by such agent, in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1000*l.* at the expiration of every sixty days after the said ninety days which the said ship may expend or lie at *Calcutta* aforesaid. And it is hereby declared and agreed by and between the said parties, that bills remitted from *India* in manner hereinafter expressed shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents as hereinbefore mentioned. And *G. Betham* doth hereby especially promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. *Buckles, Bagster, and Buchanan*, of the city of *London*, merchants, or indorsed over to them, and delivered to the owner's agent, to be by him remitted to the said *Buckles*,

Bagster, and *Buchanan*, in *London*, who it is hereby especially agreed by and between the said parties, are to receive the amount thereof, as joint trustees for the said owner and *G. Betham*, he *G. Betham* hereby authorizing and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents, and the residue, if any, to *G. Betham*. And *G. Betham* doth hereby further promise and agree to furnish and provide, at his own expence, sufficient provision and water, and also all other necessaries for the use of the passengers on board the said ship; and that he shall and will pay for all provisions belonging to the owners of the ship which shall be issued for the use of, or consumed by, any of the passengers or servants during the voyage, an account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the ship. And further, that all expences of bulk heads, cabins, and other accommodation for passengers, shall be paid by him *G. Betham*; the materials for which are to be left on board the ship at the termination of the voyage, and become the property of the owner. And *G. Betham* doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended service, save and except such as may be incurred in the port of *London*, outward and homeward bound, and once at *Calcutta*. And *G. Betham* doth hereby further agree, that the owner shall have the liberty of shipping on board the said ship outward bound, freight-free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole 100 tons, to be delivered at *Calcutta*: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by *G. Betham*, that an agent shall be put on board the

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ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said *George Betham's* table; which agent is to have the sole management, direction, and superintendence of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, provisions, and other articles which may be required for the use of the ship during her voyage, and that all bills which may be required to be drawn upon the owners of the ship for any such supplies or otherwise on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between the said parties, and especially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the *East Indies* for any *intermediate* voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve calendar months, to be computed from and after the expiration of thirty days next after the arrival of the ship at *Calcutta* aforesaid, upon his *G. Betham's* paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, viz. 25s. per ton per month for all such additional time as the ship may be so employed or detained in *India*; such additional freight being paid to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service. And it is hereby expressly provided and declared, that in case *G. Betham* shall proceed with the said ship to any part or place other than *Madeira, Madras, and Calcutta* aforesaid, without the special leave in writing of the agent of the owner for the time being, or if *G. Betham* shall be

guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any further command of or in the ship, and it shall thereupon be lawful for the owner's agent for the time being to appoint another commander for the ship in lieu and stead of the said *George Betham*." This charter-party was made and executed *bonâ fide*. On the 25th of July 1816, the following memorandum was signed and agreed to by the defendant, *Thomas Sterling Benson*, and the said *G. Betham*: "Conditions agreed between *Thomas Sterling Benson*, Esq., owner, and *George Betham*, Esq., commander of the ship *Benson*, on a voyage to *India*. Wages, say 10*l.* per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief and second mates, and surgeon, if any, mess in cabin), 150*l.*, owner providing nothing. Allowance while in *India*, three sicca rupees per day."

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Samuel Oviatt went as agent on board the said ship *Benson* under the said charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of *Buckles, Bagster*, and *Buchanan*, being merchants in *London*, on behalf of the said defendants, to the plaintiffs, by which he was directed to apply to them in case of necessity; and he did apply to them, and they acted as agents at *Calcutta*, both for the said defendants and *G. Betham*, as hereinafter mentioned. *Samuel Oviatt* acted under a *power of attorney* executed by the defendant *Thomas Sterling Benson*, which recited the charter-party, and then gave *Oviatt* authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. *Samuel Oviatt* carried out with him the charter-party, and communicated it to the plaintiffs as soon as he arrived at

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Calcutta, and before the shipping of the goods; and the plaintiffs before that time read the charter-party, and received a copy thereof, and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the plaintiffs drew bills upon certain other persons, payable sixty days after the ship *Benson's* arrival in *London* to the order of *Buckles*, *Bagster*, and *Buchanan*, which bills they delivered to *S. Oviatt*, to be remitted to the said last-mentioned persons, pursuant to the stipulation in the charter-party; and the said bills were so remitted. *G. Betham* employed the plaintiffs as his agents at *Calcutta*, who accordingly acted as such, and collected and paid over to him the freight of the goods carried in the ship on the voyage from *London* to *Calcutta*, and procured freight for him on the voyage from *Calcutta* to *London*; and they had a commission from him for procuring such freight. The ship sailed on her voyage from the river *Hooghly* to *London* with the said quantities of sugar and indigo on board, but they never were delivered to the plaintiffs or their assigns pursuant to the bill of lading, although no act of God, the king's enemies, fire, or any other dangers or accidents of the seas, rivers, or navigation of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1651 bags of the said sugar, and twelve chests of the said indigo were wholly lost to the plaintiffs, and the residue of the said sugar and indigo greatly lessened in value.

Campbell for the plaintiffs in error (the owners).—The plaintiffs below were shippers of goods on board the *Benson* at *Calcutta*, of which the defendants below were owners, and the question is, Whether the latter are liable as carriers? He here stated the declaration and the special verdict. It is found by the jury, that this char-

ter-party between *Betham* and the owners was made and executed *bonâ fide*, and was known to the plaintiffs at *Calcutta*, who received a copy of it. The judgment below does not notice the *bonâ fide* execution of the charter-party, but relies mainly on the ground of public policy. (a) Now, if the contract in this charter-party was legally made between the plaintiffs below and *Betham*, it is difficult to hold that the contract declared on was made between the plaintiffs and defendants below; and as this action, though framed in *tort*, is in reality founded on contract, it will not lie unless the defendants below have undertaken to carry the goods. Both forms of action will be supported by the same evidence: thus an action against an attorney may be in *tort* for breach of duty, or in *assumpsit* for breach of the implied promise, and the retainer must as much be proved in one as the other form of action. The carriage of goods being a matter of express contract, creating a duty between the parties (b), the breach may be declared for in *tort* as a breach of duty, or in *assumpsit* as a breach of promise. Nonjoinder of a party as defendant, might have been here pleaded in abatement. (c) It may be admitted that a party who holds out *A.* as his agent, is not discharged from liability by a secret agreement with him, or that if a ship is sent out by the owner, who has agreed that the captain shall have all the freight, the owner is liable to a party not consant of the agreement. But here it was known that the ship was freighted to the party appearing as captain, and the credit was given to him, not to the owners, who had no interest whether the ship

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(a) See per *Burrough, J.* *Richardson v. Mellish*, 2 Bing. 252.

(b) See the judgments of *Bayley, J.* and *Littledale J.* in *Barnett v. Lynch*, 5 B. & C. 605. *Bretherton v. Wood*, 3 Brod. & B. 54. And see *Leslie v. Wilson* and others, 3 B. & B. 171.

(c) 2 New R. 365. *Powell v. Layton*.

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was laden or not. In this case, *Betham* had a material interest in getting a cargo at *Calcutta*, for he had freighted the ship there and back to *London*, not so the owners who could only get the hire of the vessel already secured to them *aliunde*. The plaintiffs below knew these facts by reading and having a copy of the charter-party. Throwing out of consideration the circumstances that he was *captain* of the ship, then had she been chartered to him, and had he put her up as a general ship, he would have contracted with the shippers as owner *pro hac vice*, and as such would be answerable to them for the safe custody and delivery of the goods as carrier, they being liable to him for freight, and no privity existing between the shippers and the owner. *Annet v. Carstairs (a)* was an action for wages by the master of a ship against mortgagees, who, since the contract of the former owner with the plaintiff below, had become her owners by bill of sale and indorsement on the certificate of registry. The plaintiff received this indorsed certificate before the voyage, but had no other information of the transfer of the ship, and during his voyage corresponded entirely with the former owner. It was urged, that as he had had notice of the change of title, the defendants, from the moment of the transfer, must be considered as his employers, and the former owner only their agent; but Lord *Ellenborough* nonsuited the plaintiff saying, that title had nothing to do with such cases, the question being with whom he had contracted. Here the credit was given to *Betham*, and not to the defendants below. The *nisi prius* case of *Parish v. Crawford (b)* is the only adverse authority. The

(a) 3 Campb. 354.

(b) Hil. 19 Geo. 2. best reported in Abbott on Shipping, 3d Ed. 21. Stra. 1257. S. C.

first ground of the judgment of *Lee*, C. J. that owners are liable on account of the benefit (a) received from the contract is not very intelligible, for if there is no privity between the owner and shipper, no benefit to the former can be contemplated, and the broad position there laid down, that *Fletcher* the freighter was not the owner of the ship for all purposes, but only as having power to make use of her to put goods on board, is contrary to later decisions. But C. J. *Lee* does not shew *Fletcher* to be liable; and though it appears on the facts that he was freighter, if the plaintiff, the shipper, was not aware of the agreement between him and the defendant, the owner, (b) that case may be supported, but if the shipper knew him to be the freighter, the contract to carry was with him as such freighter. *James v. Jones* (c) is stated in *Abbott on Shipping*, to be contrary to *Parish v. Crawford*. Again in *Mackenzie v. Rowe*, (d) the registered owners of a ship had chartered her for a particular voyage, to a party who put her up as a general ship. In an action against the owners for non-delivery of goods, it was held not enough to shew the goods put on board the ship to be carried on the voyage, unless it could be proved that they were received on board by some person authorized by the owners. Then why is not *Betham* the freighter? and as such, owner *pro hac vice*? for the jury might have found collusion between him and the owners, by which the latter took the *onus* off him. Then this charter-party must be construed to be an agreement by the owner of

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(a) See per *Holt*, C. J. in *Bosen v. Sandford*, 3 Mod. 321. 1 Show. 20. 103. Comb. 117. S. C. *Rich v. Coe*, Cowp. 636. And per *Lee*, J. Rep. temp. Hard. 199. citing *Justinian's Inst.* tit. *Exercita Navis*, an action does not lie against a man as owner, but as he hath the benefit of freight.

(b) See 3 Brod & B. 171.

(c) *Abbott on Shipping*, 3d Edit. 23. 3 Esp. 27. S. C. See also *Frazer v. Marsh*, 13 East, 238.

(d) 2 Campb. 482.

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the ship with a certain individual, to have the use of her for a particular voyage, to put her up as a general ship, and to use her at pleasure within the limits of the charter-party; the receipts of the owners not being to be measured by the profits of the ship, which were to be received by the freighter, but being secured to them in another manner by him. He was to take a cargo out to *Calcutta*, but might afterwards send the ship intermediate voyages as long as he paid the monthly rents by bills; but all the freight earned was received for himself. Nor was he the less a freighter because no word of *demise* of the ship is contained in the charter-party.—[*Tindal C. J.* Freight is here to be paid for the use and hire of the ship.—] In *Tate v. Meek* (a) and *Savile v. Campion* (b), the absolute owner was held entitled to a lien on the freighter's cargo for freight, though there were no express words of demise in the charter-party; and it was never doubted that the hirers might make what use they pleased of the ships during the time agreed for. According to *Soares v. Thornton*, (c) and *Vallejo v. Wheeler*, (d) barratry may be committed by the master's deviation from the voyage, as against the freighter being owner *pro hac vice*, though the absolute owner collude with the captain to commit such barratry; nor did the defendants below exercise absolute ownership over the vessel by appointing the master and crew. When the voyage begins, the crew become the servants of the freighter, and cease to be those of the owner. If this were otherwise, the freighter of a ship could never act as master without the liability of the absolute owners continuing to exist; whereas here *Betham* being both captain and freighter, had ceased to be the servant of the owners. Though *Oviatt* was to go

(a) 8 Taunt. 280.

(b) 2 B. & A. 503. See *Yates v. Mennell*, 2 B. M. 297, and *Christie v. Lewis*, 2 Br. & B. 410.

(c) 1 B. M. 273.

(d) Cowp. 143.

in the ship as agent of the owners, he had merely their power of attorney to look after the stores and watch the performance of the covenants of the charter-party, but neither he nor they had any power over the ship till her return. Bills of the homeward cargo were to be remitted to *Buckles and Co., London*, who it was argued below were to hold them as trustees for *Betham*, and the managing owner, *Benson*, in order to the receipt by the latter of the monthly rents out of their proceeds, the rest going to *Betham*. But the charter-party remains the same, for the bills were the property of *Betham*, though *Benson* through it had a claim on them as a security. The averment that the defendants below being owners, and *Betham* master, the plaintiffs below shipped the goods to be carried to *London*, and there delivered "for certain freight and reward payable by bills in that behalf," is subdolous. A demurrer for not alleging consideration would have been answered by saying that such payment was to be made by bills payable by the plaintiffs below to the defendants below; so as to raise a privity between them. Now the duty to carry safely rests on the consideration of the payment for the carriage, which consideration must move from the plaintiffs below, as shippers, to the defendants below, as owners; whereas their freight-bills were given for the profit or loss of *Betham* the charterer only, and not for that of the owners.—[*Tindal, C. J.*—The bills were to be paid to *Buckles and Co.* the agents of the owners.—] They were merely to be deposited with them as a security, in the same way as if freight bills in any other ship in which *Betham* had an interest, had been made payable at *Buckles and Co.* who held them for him, and were to pay them over to the holders of the charter-party. So here *Buckles and Co.* are, by the order of *Betham*, to pay to the owner *Benson* his rent for the ship out of the proceeds of the freight-bills.—[*Alderson J.*—The bills were not to be in satisfaction of

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Betham's debt to the owners; but if they turned out to be of no value, *Betham* was still liable on the charter-party.] The averment that *Betham* being master, and in no other capacity received the goods on board, is falsified by the knowledge of the charter-party possessed by the plaintiffs below, and by their procuring a homeward freight for him from third persons. Suppose a party, having notice of the charter-party, had shipped goods for the outward voyage, which were lost in the course of it by *Betham's* neglect as master, would the shipper have had a remedy against the owners, the defendants below? No, for the outward freight went directly into *Betham's* possession on his arrival at *Calcutta*, and no allegation as to payment of freight by such a shipper to the defendants below, could have been supported. Besides, *Betham* had liberty to take intermediate voyages, to which the same reasoning applies; nor is there any distinction between the outward and homeward voyages, except in the nature of the security for the hire of the ship there stipulated for. Then *Jones v. Jones* and *Mackenzie v. Rowe* cannot be distinguished from this case; in both of which instances the freighter was held owner *pro hac vice*, and the declarations against the registered owners must have contained the averment that they undertook to carry for reward payable to *them* in that behalf. If the plaintiffs below had not known from the charter-party that *Betham* was freighter as well as master, they might certainly have sued the owners as well as him, but knowing that fact, they contracted with him as principal. If no privity existed between the owners and shippers, so that the former could not sue the latter for freight, how can a contract exist between them, so as to create a duty in the owners to carry safely? Now, had the defendants below sued the plaintiffs below for freight of goods shipped at *Calcutta*, the latter would have produced the charter-party, shewing

that freight was not receivable by the defendants below as owners, but by *Betham*; thus also proving that he was not considered by them as the mere agent of the owners, but as entering into the contract for his own benefit. Then, as the defendants below, the owners, could not have sued the plaintiffs below, the shippers, for freight, for want of privity, (a) the shippers could not sue the owners for the loss of goods, for want of reciprocity.

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The arguments were this day resumed.

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F. Pollock for the defendants in error (the shippers.)—The question is, What is the legal effect of the agreement between the owners and master, here called a charter-party? The Court will decide on such effect, whether the plaintiffs below knew of its terms or not. For though the question has been stated to be—With whom was the contract made?—that cannot be the test, for it involves other questions, viz. whether the contract was made with the owners as such, or with the master, as master and owner *pro hac vice*, and which can only be resolved by the effect of this instrument. Thus, the material allegation that the goods were to be carried for reward was proved, if the contract was with the owners; the like of the averment that they were to be carried for freight; for the payment to the master was payment to the owners, if he was also owner. Again the allegation that the goods were had and received by *Betham*, the master, was proved, if he was master; and his mis-conduct as the servant of the defendants below is proved, if he was their servant. Now the effect of this charter-party does not depend on its being executed *bonâ fide*, or on the fact that that does

(a) See the judgment of *Lee, J.* in *Boucher v. Lawson*, Rep. temp. Hardw. 200. And Abney's argument, S. C. 87.

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not form part of the judgment below. In a case, where a particular purchase by a bankrupt was impugned as not being *bonâ fide*, it having been made when he could not have been acting *bonâ fide* as to every one, Lord *Tenterden* repudiated that wide construction of those words, saying, that they occurred in the bankrupt acts (a), but meant merely that the thing dealt with should be what it professes to be; if a sale or pledge, that it shall be a sale or pledge. So, if this instrument professed to be a charter-party, it should be treated as such, and the plaintiffs below rely on the intention of the parties that it should be put into effect; saying that notice of the charter-party was given to them by *Oviatt*, expressly that defendants might get possession of the freight earned, and that any payment by plaintiffs as shippers, to *Betham* as master, would be in their own wrong, the whole freight belonging by the charter-party to the defendants as owners. The right to receive freight and the appointment of the master, are said by Lord *Hardwicke* to be the root of the owner's liability as a carrier, *Boucher v. Lawson*. (b) But whether that *dictum*, or *Parish v. Crawford*, are law or not, does this instrument transfer the ownership from the real owners to the master, or is it a peculiar mode of appointing a master, with peculiar powers, for the benefit of all parties? The plaintiffs below contend for the latter construction. First, if *Betham* remained under the controul of the servant of the owners, who might remove him as they pleased, and did send an agent on board for that purpose, then, though he had large powers, and was entitled to receive certain benefits, still,

(a) 6 Geo. 4. c. 16. s. 47. and in the repealed acts 46 Geo. 3. c. 135. s. 2. 49 Geo. 3. c. 121. s. 2. &c. See *Robinson v. Vale*, 2 B. & C. 762. These words are referred to in *Termes de la Ley*, as used in the act of navigation, 12 Car. 2. c. 18. s. 2.

(b) Cas. temp. Hardw. 85. 194. ante, 60. n. a.

if, in the result, the owners were to have the benefit of the voyage, their legal responsibility remains. This instrument called a "charter-party of affreightment," will become a partnership agreement, if profit and loss are to be shared by the parties; no words are here used to part with the possession of the ship to any one. The first clause is the key of the instrument, the rest being merely stipulations controlling what might be done under the first clause. *Betham's* liberty to take on board such merchandizes as he might think proper to ship, occurs in common charter-parties, and has not the aspect of an agreement that he should be owner *pro hac vice*, but rather that of master; he might take goods on board, paying freight to the owners in a particular way. He cannot be owner *pro hac vice*, as well as master under the charter-party, while the latter is the prevailing character with which he is invested by it, as also by his conditions with the defendants below for the voyage; which shew that the owners were to receive the freight of all goods put on board. The owner's agent is to have power to displace *Betham*, and appoint another master; then who can be owner? For if he is owner *pro hac vice*, he as such would have power to appoint a master. After the execution of the charter-party, conditions are agreed on between *Benson*, calling himself owner, and *Betham*, calling himself commander of the ship. The power of attorney to *Oviatt* as the owner's agent, is also dated after the charter-party. Then the ship was not actually let for a certain time, but a peculiar mode of appointing her master was adopted, in order that she should earn a certain sum. As this charter-party is intended to have a double aspect, viz. to transfer the ship in part only, and to appoint a master, public policy may be considered. If a contract is evidently designed to compass things inconsistent with each other, the Court will decide on

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the view which is free from impolicy and injustice. Suppose an agreement framed so as to give a share in the profits of a trade to a party, who, by the same agreement, was to be shielded from the effects of loss, he will be, nevertheless, held liable for such loss.—[*Tindal* C. J. such an agreement, would be good between the parties, though the rights of third persons would remain the same.—] Nor would it make any difference to third persons though they had notice of the agreement, which would by law be held a partnership, even if there were a direct stipulation that the party should not be a partner. Now here whether it was or was not intended by *Betham* to give the owners the profits, but to shield them from loss, the question is whether they have not failed to make him owner *pro hac vice* or more than master only? In *Boucher v. Lawson*, the owners appointed the master, but had not the further power of displacing him, here reserved; and though in that case the owners did not receive the freight, so that the second ground of lord *Hardwicke's* judgment did not occur, and judgment was ultimately given for defendant, yet it is an express authority that if a person be appointed, and act as master, the owner is liable to shippers of goods, though there may be a special agreement between him and the master as to the mode of paying the wages and receiving the freight (a). By the instrument called the charter-party, *Betham* is treated as the captain of the defendants below, and the power to displace him shows that they remained the owners. Suppose he had been displaced before reaching *Calcutta*, and that *Oviatt* with another master appointed by him, had received goods on board there, the shippers of which knew of the charter-party; it could not be said that the new captain acted on the part of *Betham*, against whom only any

(a) And see Lord Mansfield's judgment in *Rick v. Coe*, Cowp. 639.

remedy existed for not delivering goods.—[*Tindal C. J.* If A. B. had been appointed captain by the owner's agent, *Betham* would not, by the charter-party, have been displaced as owner, but would have gone on loading the ship.—] The owners cannot retain control over the ship as against third persons, so as to get rid of the burden while they reap the benefit, and therefore no interest passed to *Betham* from them, except for a particular purpose disclosed by the charter-party to the plaintiffs, who have therefore proved every averment of the declaration against the owners, by proving their captain's neglect to deliver the goods in *London (a)*.

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Campbell in reply. It is not denied that this action, though framed in *tort* is substantially founded on contract. In *Marzetti v. Williams (b)*, which occurred since the former hearing, it was held immaterial whether the action is framed in *assumpsit* for breach of promise, or in *tort* for breach of the duty arising from the promise. The question is, with whom did the plaintiffs contract?

(a) See *Turberville v. Stamp*, Lord Raymond, 264. and *ante*, 51. note (a).

(b) *Marzetti v. Williams*, K. B. 18 November. *Marzetti*, the plaintiff kept cash with *Williams* and Co., the defendants, and drew a check on them, which he gave to his creditor *Hoare*. It was presented at *Williams's* about three o'clock in the afternoon, but the plaintiff had not sufficient cash there to pay it. At eleven o'clock the next morning, a payment of sufficient cash was made to his account, but by neglect it was not carried into the ledger, and the check was refused payment at three o'clock. Though it was paid next day, an action was brought for dishonoring the check. The jury negatived malice by the defendants, or damage to the plaintiff, yet the court held him entitled to a verdict in *tort* for nominal damages, as the action was founded in contract. The like result would have taken place in *assumpsit*, as there was reasonable time for the defendants between eleven, when the sum was paid in, and three, when the check was presented the second time, to make the entry in the ledger of the sum paid in.

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if with the defendant, *Benson*, the action lies, but if with *Betham*, he only is liable. *Parish v. Crawford* is not relied on on the other side; and *James v. Jones*, and *M'Kenzie v. Rowe* are contrary to the *dictum* of Lord *Hardwicke*; and in practice, the owner invariably appoints the captain and crew. This freight is not received for the benefit of the defendants, who were only to receive it from *Betham*, though they had a security for it in the hands of *Buckles* and Co., who were to procure the payment of the bills. The dictum of C. J. *Lee* is inapplicable here, where the owner does not depend for profit on the rate of freight to be paid by the shipper, and sustains no loss if freight is not received. The freighter, not the owner, is the carrier of the goods, where the shippers, as in this case, know the transaction between owner and freighter. It is not argued that a man cannot be freighter unless he hires the hull and masts, &c., pays the seamen and furnishes the stores; the course of trade being, that in *quo modo* the owner remains in possession of the chartered ship, appointing the captain, crew, &c. Now if by *freighter* is meant a man having exclusive possession of a ship, *Betham* was not such, but by the liberty to take in goods, as in common charter-parties, where the captain is not an owner, he had a right as *freighter* to put the ship up as a general ship, and to take in goods within the limits of the charter-party; at *Calcutta* he was to re-load her to *London*, and had thus power over her for all the homeward as well as outward voyage. If freighter, in the common sense of the word, he is carrier; for the reward goes to him and not to the owners. In *Vallejo v. Wheeler*, *Soares v. Thornton*, *M'Kenzie v. Rowe*, and *James v. Jones*, the owners *pro hac vice* did not appoint the captain or crew. This was to be *Betham's* adventure, and he was to pay a certain sum for the chance of profit by the voyage. Though an absent owner might be liable in a case of collusion, or

for stores in a foreign port, because the captain is *his* captain; his responsibility cannot be extended further. It is not attempted to say, that because the characters of freighter and captain coalesce, the original owners remain liable. *Oviatt* was merely an agent to do what the owner would, as to the stores and supplies to be provided by the latter, and does not controul the loading of the ship. *Betham* continued in command till the loss happened; but had *Oviatt* appointed another master, *Betham* would have remained freighter, so as to receive the money for the carriage of the goods.—[*Alderson J.* The stipulation for power to appoint another master only applies to the outward voyage.—] The freight bills were only for the security of the owners, but were for the profit of *Betham*. A contract, if not illegal, will prevail; and on what ground of policy should a shipper at *Calcutta* be prevented from trusting, as carrier, a man who receives the freight from him there? It is well known that the greatest mercantile houses are freighters of the ships of others.

Cur. adv. vult.

TINDAL, L. C. J. now delivered the opinion of the Court.—In this writ of error, the sole question appears to be, whether, according to the legal construction of the charter party set out at length in the special verdict, and made between the defendants below, who were the owners of a ship called the *Benson*, and one *Betham*; *Betham*, at the time of the contract for the conveyance of the goods in question made in the *East Indies*, when he was clearly captain and freighter of the vessel, became *pro tempore* the owner thereof; this action, though in form an action of *tort*, being actually and substantially an action of contract founded on the bills of lading set out in the special verdict? To decide, therefore, whether the action is rightly brought, it must be ascertained with

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whom the contract was made, whether it was made with the defendants below as owners of the vessel, or whether it was made with *Betham* alone, who was then captain and freighter for his own benefit, and on his own behalf. The special verdict has found two things: first, that this charter-party was entered into *bonâ fide*, without secret or sinister design in framing it to leave the owners of this ship in the enjoyment of the profit, at the same time intending to exempt them from the responsibility to shippers of goods; but the real object of the owners and freighters is to be collected from the charter-party itself. The only other fact found is, that the charter-party was communicated to the plaintiffs below before the shipping of the goods on board the *Benson*, and that they had seen and read a copy of the charter-party, which latter finding negatives any inference that otherwise might have been raised, that *Betham*, being in command of the vessel, had held himself out to the plaintiffs below, as the agent of the defendants below in the conduct and management of the ship; so that the shippers must have known the real situation, and relative right of the captain and owners before putting their goods on board to be carried on that voyage. The question, therefore, to be considered is, simply that of the construction of the charter-party itself; and we think, on the whole of the instrument taken together, the fair construction is, that as between *Betham* and the shipper of goods, he was owner of the ship, during the continuance of the voyage described in the charter-party.

In the first place, by the terms of the charter-party, the owners covenant "that the ship shall, if required, be kept and continued in the service therein described during twelve calendar months, or such longer time as shall be necessary to complete the voyage." *Betham*, on the other hand, covenants that he will receive and take the ship into his service for the term of twelve calendar

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months certain, and until the voyage be ended, paying to the owners for the use or hire of the ship at and after the rate of 25s. per ton, per calendar month, during the term of twelve calendar months certain, and till her return to the port of *London* and clearance, or up to the day of her being lost, captured, or last seen or heard of. But it was objected, on the part of the plaintiffs below, that this contract contains no word of express demise; and undoubtedly it does not. But even in a lease of lands, no such words are absolutely necessary; for in *Coke on Littleton*, 45 b. it is said, "any words amounting to a grant are sufficient to constitute a lease;" and there are cases in the books to show that if a man covenants that A. shall have land for a term, rendering rent, or that the covenantee shall enjoy land, those words will amount to a lease. (a) Now the present case approaches very nearly to those above referred to; for the owners do covenant that the ship shall be kept in the service of *Betham* for a certain time; *Betham* covenants that he will receive her into his service during that time, and will pay for the use or hire of her a certain freight. These, we think, are stipulations equivalent in effect to the actual demise of the ship. But further, the whole of the ship is so far parted with, that it is thought necessary that *Betham* should covenant with the owners that they should be allowed to load, on the outward voyage, goods not exceeding in the whole 100 tons.

Again, the mode in which the ship was to be used, and the freight reserved by the charter-party was to be satisfied, supports the same construction. The ship, both on the outward and homeward voyage, was to be put up by *Betham*, (who in many parts of the charter-party is called the *freighter*), as a general carrying ship. The freight which the owners stipulate to receive of him is quite independent of that which he receives for the

(a) *Doe dem. Johnson v. Ashburner*, 5 T. R. 168. n. and see 1 Leonard, 136. and other cases collected *Bos. Ab. tit. Lease, E.*

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carriage of goods. Theirs is a time freight, his depends on the carriage of the goods shipped. If the ship went out without any cargo, or was lost before her arrival at her outward or homeward destination, no freight would be received by *Betham*, but the owners would still receive the same amount as if she had returned full, or in case of loss of the ship, up to the day of her loss. Under these circumstances, we think that *Betham*, the captain, in putting up the ship as a general ship, and signing the bills of lading, cannot be considered as acting as the servant or agent of the shipowners, or in any other manner than as the temporary owner of the ship.

The three objections principally relied on in argument by the defendants in error, were, First, that the same person who takes the ship as freighter was himself appointed captain by the owners: Secondly, that an agent was put on board by the owners, vested with powers inconsistent with *Betham's* authority and ownership of the vessel *pro tempore*: and Thirdly, that the owners virtually received the benefit of the homeward voyage by the transmission of the freight bills to *England*. With respect to the first, it is almost the invariable usage of owners of ships to appoint the captain and crew, though they let out a ship on a charter-party: the chartering of the ship not being so much the chartering of the hull, as of the ship in a fit state for mercantile adventure; and there seems no reason therefore, why chartering a ship in any particular case to the captain of that ship, should create any more responsibility in the owners to the shippers of goods, where such fact is known to them, any more than if the ship was freighted to an entire stranger. The second objection is answered by reference to the charter-party itself, by which it appears, the authority of the agent was limited to the superintendence of the acts of *Betham* as captain, and not as freighter; the utmost authority given to the agent being that of displacing *Betham* as master, and appointing another per-

son as master, in case he should be guilty of a breach of any of the agreements made on his part. If *Betham* ceased to be master, by the terms of the charter-party, he would still continue the freighter, possessing the same power of putting goods on board, and liable to the same responsibility on the one hand, for a time-freight, and on the other, for the safe conveyance of the goods shipped. As to the third objection, the charter-party gives the owners the security of the freight-bills received by the freighter, but gives the owner no direct or immediate interest in the freight earned, the whole of the surplus of which belongs to *Betham* alone. If he had obtained no homeward cargo from *Calcutta*, so that no freight-bills would have been transmitted; the owner would still be entitled to the same freight. The security does not extend at all to intermediate voyages. If the ship had been lost on such voyage, there would have been no freight payable to *Betham*, but still he must have made good his own liability to the owners for the use and hire of the vessel. The effect of the charter-party is, that it makes *Betham* the owner *pro tempore*, and freight is to be paid to him for the use of the ship. We think, therefore, that the defendants below were not liable to an action for the non-delivery of these goods, and that the judgment of the Court of King's Bench must be reversed.

Judgment reversed.

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Nov. 26th. WILLIAM RIDOUT, Executor of JOHN RIDOUT, Senior, v. BRISTOW and Wife.

Where a promissory note expresses the consideration for which it is given, evidence cannot be given of a consideration inconsistent with its terms.


ASSUMPSIT by the executor of the payee of the following promissory note made by the female defendant after the death of her first husband, *John Ridout*, junior, and before her second marriage, against *Bristow*, the second husband, and the female defendant as maker.

“4th Sept. 1824.

“Twelve months after date I promise to pay Mr. *John Ridout* (the testator) or order one hundred pounds, value received by my late husband. As witness my hand,
“*Love Ridout.*”

£32 was paid into court on the counts for goods sold, money lent, and money paid. At the trial before Mr. Baron *Bolland*, at the Exchequer sittings after last term, it appeared, that in 1820 the testator *John Ridout*, his executor, *William*, and the intestate, *John*, were a father and two sons in trade together; and that the intestate died in that year, considerably in debt to his father. A settlement of accounts between his widow and administratrix and the testator was entered on, but having failed, mutual releases were proposed to be executed between them. The testator refused to execute till the above note was given to cover several claims which he had paid, and might be called on to pay on his son's account. A list of these claims was made out at the time of giving the note. For defendants it was contended: 1st, That the note on the face of it negatived any consideration between the parties, and purported to be made for the debt of another:

2dly, That the note was in the nature of a penalty to indemnify testator as well for future as existing debts of his son the intestate; and that the plaintiff could only recover so much as was proved to have been so paid by his testator. The plaintiff then proved payment by the testator of four claims on behalf of intestate amounting to about 99*l.*, one of which the defendant (the administratrix) disputed, as not paid on account of the intestate, but on her own account; and another as its subject-matter was forgotten by the witness; payment of a third by testator was not distinctly shewn; and a fourth was clearly proved to be due from the intestate, and paid by testator. A deduction of 30*l.* was also claimed for a debt which they urged *John Ridout* senior had promised to pay. It was left to the jury to say what was really due, and the verdict was for the whole amount of the note, deducting the 32*l.* paid into court. A rule having been obtained to set aside the verdict and enter a nonsuit on the points taken at the trial,

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Follett shewed cause.—It was not necessary to shew consideration for the note; but if it was, a sufficient consideration appeared on the face of it; *viz.* value received by the deceased husband of the maker. Whether the note imported a consideration or not, the *onus* of shewing the absence of it was on the defendant. Nor was it necessary that a consideration should be shewn between the parties; for a note expressed to be given by *A.* to *B.* to pay him the debt of *C.*, may be sued on by *B.* (a) This case reverses *Rann v. Hughes*, (b) where an administratrix was sued on her personal undertaking to pay the debt of the intestate, and was held not liable, because no consideration appeared for the promise laid:

(a) See *Popplewell v. Wilson*, 1 Strange, 264. on Error from C. P. cited by *Bayley*, B. post.

(b) 7 T. R. 350. n.

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for the administratrix is here sued on the liability she has personally incurred by making a note, though to secure a similar debt. *Childs v. Monins* (a) shews that the female defendant is personally liable and need not have been shewn to be administratrix. In that case the defendants as executors jointly and severally promised to pay to the plaintiff, a creditor of the testator, his debt on demand with lawful interest. The Court held them personally liable, as the stipulation for interest imported a consideration of forbearance to sue: but on this note nothing of the character of administratrix appears.—[*Bayley B.* In *Child v. Monins*, the executors who were held personally liable, had bound themselves jointly and severally; a duty not cast on them by the law (b).]—However the release given by the administratrix recited the fact of her administration. Reduction of the damages is not part of the rule, and as part of the consideration for the note was the testator's signature of a release to the administratrix, the items of payment by the testator need not be considered. There is no proof that the intestate died without any assets, though he was indebted to the testator. But evidence of consideration was in fact given, though not tendered as such, but as evidence of private debts due from the intestate. Those were liabilities to arise in future on the testator's promise to pay them after the intestate's death.

Edward Lawes Serjt. and *Barstow* in support of the rule.—This note on the face of it negatives any consideration between payee and maker, and is merely a special agreement to pay the debt of a third person. In *Childs v. Monins*, assets and forbearance were shown, and the note was given jointly and severally by the de-

(a) 2 Br. & Bing. 460. 5 B. Moore, 282. S. C.

(b) See *Chambers v. Minchin*, 7 Ves. jun. 197, S. *Doyle v. Blake*, 2 Sch. & Lef. 231.

fendants *as* executors. Here the absence of assets was proved for the defendant; forbearance could not be given to the intestate, and was not stipulated for by the widow, nor did she appear to be administratrix on the note. The words "value received by my late husband," appear on the evidence to mean value received in satisfaction of debts which the testator might have to pay; therefore the note was for his indemnity. — [Bayley B. If it was given to indemnify against specific debts, the burthen was on you to prove that they were not paid by the testator or the plaintiff, as his executor, or that no value was given for the note, thus showing a failure of consideration.]—In *Wain v. Walters*, (a) and the other cases on the statute of frauds, by which it has been followed, the written contract imported no consideration, but required it *aliunde*; now as between these parties, this note is within that statute, and is not within the custom of merchants. In *Childs v. Monins*, the defendants were *primâ facie* liable on the instrument as a note. Here an item, forming part of the consideration and alleged to be due from intestate, was due from the widow personally, and only one payment was distinctly proved.

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BAYLEY B.—This is an application to set aside a verdict for the plaintiff for 68*l.* plus 32*l.* paid into Court, and to enter a nonsuit. If there is any evidence to entitle the plaintiff to recover, it is impossible to enter a nonsuit merely on the ground of a verdict being given for more than on the strict evidence it should have been. But I think there was evidence strong enough to sustain the verdict independently of the note. Supposing it to be given for the mere indemnity of the testator, there is evidence to bring the verdict to nearly 100*l.* Now, this action is on a note, which *primâ facie* imports

(a) 5 East, 10.

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a consideration without proof of consideration *aliunde*; but it is said that as this note specifies some consideration, it imposes on the plaintiff the necessity of giving more than the usual proof, and is, in reality, void on the face of it, as not expressing the existence of assets of the intestate or other consideration. No authority is cited on the subject, but it is clear, that if, instead of a note, a creditor takes a written security which *must* express a consideration, that consideration must be proved to exist *aliunde*; but if, by the form of the instrument, as in a note, the maker submits to be bound personally, and no consideration or evidence of it *aliunde* is necessary to its binding effect, no such proof will be necessary. Now, by this instrument, the defendant promises payment twelve months after date, for value received by her late husband. She was, in fact, his administratrix; but supposing she was not, and that she had agreed to give the note for a debt due by him, I think, under the circumstances, it would be binding. This is not a case of want of consideration, for a consideration exists which makes it reasonable that this security should be given. In *Popplewell v. Wilson*, (a) a note expressed to be given for a debt due from a third party to the payee, was held good in the hands of a payee wholly alien to the maker, for the promise being absolute, the note was as negotiable as if it had been generally for value received.

Besides, forbearance might be extended to the representative of the intestate, though it could not to him. It is said that an absence of assets appears, but though an ultimate failure of consideration might take place owing to the intestate's debts to his father; it does not appear that the former died without property, and we do not know whether other debts existed. Then, if the administratrix takes on herself to give a security,

(a) Stra. 264.

which may induce forbearance to her, she cannot, at a distant period, call on the holder of that security to prove she had assets, for by this note she admits assets, and invites inquiry into that fact. The plaintiff is not driven by the note to prove assets of intestate in the hands of the administratrix, in support of his claim, and the administratrix would not be allowed to prove that she had none. The cases on the statute of frauds do not apply; nothing there appeared to support the promises, for there is no implied benefit in undertaking to pay the debts of another, and a simple promise to pay such a debt where the party is under no legal or moral liability to do so, is reasonably held to be *nudum pactum*. Here, on the other hand, as the instrument of itself binds the maker, admits assets of intestate, and in its probable consequence induces forbearance, I am of opinion that consideration must be taken as existing, in case the party is *prima facie* liable to pay. In prudence the plaintiff should have shewn what precise sums the note was intended to secure, but is not bound to do so. For resistance may be made to an action on a bill or note, on the ground of want, failure, or illegality of consideration; but I apprehend that in the case of a note, as well as of any other written instrument, evidence cannot be given of a consideration, differing from, or inconsistent with, the tenor of the written instrument. In *Rawson v. Walker*, (a) an action by payee against maker of a note payable on demand, proof was offered that the note was agreed not to be put in suit except in a certain event. Lord *Ellenborough* rejected the evidence, saying, "I am ready to receive evidence to shew the consideration illegal, but I cannot receive parol evidence inconsistent with the terms of the note." (b) Again, in an action by indorsee against indorser of a note payable two months

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(a) 1 Stark. N. P. R. 361. (1816).

(b) And see *Woodbridge v. Spooner*, 3 B. & A. 232. 1 Ch. R. 661. S. C.

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afterdate, evidence was offered, that on defendant's refusal to indorse, a bargain was made between the plaintiffs and him, that plaintiffs should renew the note when due, but Lord *Ellenborough* refused to admit proof inconsistent with the written instrument. (a) But suppose the defendant to have been entitled to prove a consideration different from that expressed on the note, it was for *him* to shew a failure of consideration in any item which formed in part a ground for the note. Now he does not shew whether the item of which the origin was unexplained by the plaintiff's witness, was due or not. Again, if the note was given for indemnity against specific debts, the creditors might be called to shew that they had not received payment. One item due from intestate, was clearly paid by testator for him, and though there is no distinct evidence of such payment of another similar item, whilst another claim paid by testator was due from the administratrix personally, and not from the intestate, the plaintiff has had no notice of such an inquiry under the present rule, which is not directed to the reducing the verdict, but to a nonsuit. This being a note *prima facie* binding on the female defendant as widow and administratrix, it is wholly different from any agreement which is subject to the statute of frauds, and if it was given to a certain degree for the testator's indemnity against future claims on the intestate's account, that has not been made out to the extent necessary on this rule.

GARROW B. concurred.

VAUGHAN B.—This rule was obtained on the ground that the note was bad on the face of it, as payable on a contingency, and therefore was not negotiable within

(a) See *Hoare v. Graham*, 3 Campb. 57. &c.

the custom of merchants ; but with the exception of the words " by my late husband," it is in the usual form, and imports a consideration, as to the proof of which those words make no difference ; the plaintiff, therefore, was entitled to a verdict without proving consideration. If the plaintiff had been compelled to give such evidence, the defendants as between these parties might have proved a want or failure if it, but it is not necessary to decide whether they might have proved a different consideration.

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BOLLAND B. If *Popplewell v. Wilson* had been cited at the trial, I should not have given leave to move for a nonsuit. Besides, the evidence shewed an actual consideration, and it was for the jury to say, whether the items alleged to have been paid by the father were so satisfied.

Rule discharged.

In the Matter of the Estate and Effects of ROBERT EWING deceased. Nov. 20th.

A Rule had been obtained in *Hilary* term last, founded on 42 G. 3. c. 99. s. 2. (a) calling on *Thomas Stonor*, Stock in foreign funds locally situated abroad, is personally following the domicile of the owner ; therefore a bequest of such stock by a party domiciled in *England* is liable to legacy duty.

(a) 42 Geo. 3. c. 99. s. 2. enacts, " That in every case in which any executor or executors, or administrator or administrators, shall not have paid the duties granted and payable upon, or in respect of any legacies, or any personal estate, or any share or shares of any personal estate of any person dying intestate, within proper and reasonable time, it shall be lawful for his Majesty's Court of Exchequer upon application to be made, &c., on such affidavit or affidavits as to the said Court may appear to be sufficient, to

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executor of *Robert Ewing* deceased, to shew cause why he, as such executor, should not deliver to the Commissioners of Stamps an account on oath of all the legacies

grant a rule, requiring such executor or executors, administrator or administrators to show cause why he, she, or they, should not deliver to the said commissioners an account upon oath, of all the legacies, or of the personal property respectively paid, or to be paid or administered by him, her, or them, as the case may be; and why the duties on any such legacies, or any shares or residue of any such personal estate, have not been paid, or should not be forthwith paid according to law; and to make any such rule of court absolute in every case in which the same may appear to the said court to be proper and necessary for the better enforcing the payment of any of the said duties."

The acts now in force respecting legacies, are 20 Geo. 3. c. 28. s. 3. 36 Geo. 3. c. 52. 37 Geo. 3. c. 135. 39 Geo. 3. c. 73. 42 Geo. 3. c. 99. s. 2—4. 45 Geo. 3. c. 28. 48 Geo. 3. c. 149. s. 44. 55 Geo. 3. c. 184. and Schedule Part III.

The repealed acts and regulations are, 20 Geo. 3. c. 28. (except s. 3.) 23 Geo. 3. c. 58. 29 Geo. 3. c. 51.

By 36 Geo. 3. c. 52. s. 6. it is enacted, " That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for answered and paid, by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they, shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled to retain, either in his, her, or their, own right, or in the right, or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or

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persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such cases, the duty which shall be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his majesty, his heirs and successors according to the provisions of this act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid shall deliver, pay, or otherwise however satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, such duty not having been first duly paid to his majesty, his heirs and successors, according to the provision herein contained, then, and in every such case, such duty shall be a debt to his majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made."

36 Geo. 3. c. 52. s. 27. enacts "That no person having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or other person hereby directed and required to account for any duty, shall pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, &c. and of the person to whom such legacy, &c. shall have been given, and the amount or value of the legacy, or part of the legacy, &c. for which such receipt or discharge shall be given, and also the amount, and the rate of duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatsoever, unless the same shall be stamped, as required by this act."

36 Geo. 3. c. 52. s. 28. enacts "That where any person who is required to account for legacy duty satisfies or compounds for any legacy, without taking a stamped receipt in the form prescribed by the preceding section, both he who pays and he who receives the legacy shall forfeit 10l. per cent. on the amount."

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as such executor as aforesaid, and why the duties thereon have not been paid, or should not forthwith be paid according to law. The facts were as follows:—In *December* 1827, the testator died in *London*, possessed of property to the amount of 700,000*l.* in the *American* (United States), *French*, and *Russian* stocks, and by will bequeathed one-third to his niece for her life, and the residue to his nephew *James Ewing*, after discharge of his debts and some other trifling legacies. The executor took out prerogative administration, and paid the debts and legacies out of the English property. *James Ewing*, the executor, being absent from *England*, sent powers of attorney to the different countries for the receiving and investing of the dividends, and his name was entered in the *American* books opposite that of the testator. On the return of *James Ewing*, in 1829, he called on the executor to transfer the property in the foreign stocks to him in the respective countries under a power of attorney signed by him. The above *American*, *French*, and *Russian* stocks are not transferable, or the dividends payable in this country. Legacy duty to the amount of 26,000*l.* was claimed on the above residue of the estate of *Robert Ewing*, under 55 Geo.3. c. 184. Schedule, Part 3.

Brougham and *Lynch* shewed cause.—The question is, If a testator be domiciled in *Great Britain*, having bequeathed specifically or by way of residue, stock in foreign funds locally situate out of the jurisdiction of the courts, and his executor does any act here in order to a due administration of such bequest, is the property so bequeathed subject to pay legacy duty as personalty? First, the foreign stock here bequeathed is real property. Secondly, it has a locality in each country where it is situate. Thirdly, it is not personalty within 55 G. 3. c. 184. On the first point — foreign stocks, like our

own, are perpetual annuities, vested in the holders by the acts of various foreign governments, and forming part of their national debts, subject to redemption. There are two kinds; one, like our unfunded debt, passes by delivery, and the *coupons*, like Exchequer tallies, entitle the bearer to payment of dividends in respect of his shares. These are generally payable by some agent in England. The other kind of foreign stock can only be transferred abroad, and the dividends, like our Bank dividends, can only be received at the national banks of the different countries by the party entitled, or his agent duly appointed for that purpose by power of attorney. This kind, therefore, is only locally governable. Stock in the English funds has been considered to partake so far of the qualities of realty in respect of its place of payment and security on the national revenues, though arising from personalty, as well as land, that it has been necessary in every statute to declare it personalty. (a) It would otherwise have descended to the heir *quâ* a perpetual though redeemable annuity.—[*Alexander L. C. B.*—Is there any annuity not granted to a man and his heirs which either by the law of England or Scotland can become heritable?—] An annuity granted to *A. B.* by deed is personal, and not heritable, whether secured on land or not, because there are no words of inheritance; but if the estate granted in a will be so described, that the words of gift imply in themselves a heritable estate, heirs will take; *e.g.* under a gift to a man and his *issue*. (b) So here, a perpetual annuity which survives the party implies a heritable nature.—[*Bayley B.*—The provision that British stock shall not be descendible to heirs is necessary, because it is secured on the consolidated fund of the country, which includes the land-tax, (c) and an annuity charged on land is in

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(a) See the last instance, 11 Geo. 4. and 1 W. 4. c. 13. s. 14.

(b) 4 Bpna's Ecclesiastical Law, 147, 148, *notis.* Tyrwhitt's edit.

(c) See 56 Geo. 3, c. 98. s. 1.

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the nature of a rent-charge. Unless it is shewn as a fact that the lands of the *United States*, *France*, and *Russia* are charged with the stock in question, or that such stock is real property in the respective countries where it is situate, we must consider it merely as a personal debt from each of those states to the holder of the stock, or his next of kin, if he makes no testamentary disposition, and to his legatees if he does.]—In this case tolls of turnpike roads in the *United States* form part of the security for the *American* stock; such tolls are in the nature of canal shares, which are real estate, the subject of fine and recovery in every county where the canal runs, (a) and provisions are accordingly inserted in the road and canal acts making them personalty. The dividends on these stocks can only be paid at the national banks of *Washington*, *Paris*, and *Petersburgh*.—[*Bayley B.* So a bond payable to *A.* at *St. Petersburg* may only be claimable there, but would pass by the will of a person domiciled, or by the assignment of a person becoming bankrupt in *England*.]—It is not disputed, that on that ground legacy duty is payable on *Russian* and *Prussian* bonds, they being payable to the assignees in *England*.

Secondly, the locality of these foreign stocks may be elucidated by the course of administration pursued in *England*, with a view to the local *situs* of the different securities for debts. Where a party having a simple contract debt, represented by a bill or note, being in amount a *bonum notabile*, and locally situate in one diocese, dies in another, probate or administration granted in the diocese where he died is sufficient, the debt being said to be there, though the symbol of it be locally situated elsewhere. Whereas if he die in one diocese, possessed of a specialty existing at the time in another, a prerogative administration covering both

(a) *Drybutter v. Bartholomew*, 2 P. Wms. 127.

dioceses is necessary, or a probate or administration in each diocese. Now the only reason for this difference is, that the law distinguishes between personalty in the shape of a specialty, and personalty in that of a simple contract only, giving it a locality in the former case which it denies in the latter. Thus a difference is established to exist between different kinds of debt in respect of locality. Next, the stocks in question can only be administered abroad. This is an additional attribute of locality, not possessed by a bond conditioned for payment at the Royal Exchange; the penalty there not being local, and the obligation as well as the benefit of the obligee being transitory. For when taken from one diocese to another, it exists equally in the latter, and would be transferrable by assignment in every country, constituting assets in the hands of the assignee's executor, wherever it was found.—[*Bayley* B. Had this party, being domiciled here, died testate, would it have made any difference in the distribution, that different rules of succession prevail in the *United States*, *France*, and *Russia*? (a)]—Though it may be personalty *quoad* succession, and vesting in the executor may pass by will as a personal legacy, it may have a locality, if it can only be transferred and dealt with on the spot by the party entitled or his agent. (b) The executor may suffer by the conflict of our laws with those of the foreign states. For if he is found within them, he may be called on in

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(a) *Seemle* not; see *Balfour v. Scott*, 6 Bro. P. C. 550. 5 Ves. 794; and see the Lord Chancellor's judgment in *Bempde v. Johnstone*, 3 Ves. 204. and cases collected, 5 B. & C. 444.

(b) *Ex parte Horne*, 7 B. & C. 652. (H. 1828.) Property otherwise personal, may have a local situation *quoad* probate. Thus a canal act provided that the shares should be deemed personalty. The canal passed through the dioceses of *Worcester* and *Lichfield*. The transfers of the shares were filed at the public office of the company in the latter diocese, where also the dividends were made, and the books of account kept. A probate in that diocese was held sufficient to pass a right to a share of the profits.

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these courts to make entire distribution of the testator's assets. The defence that he, as well as the testator, was domiciled in *England*, and being called on to make distribution there, was obliged to pay legacy duty, would not avail, if these funds, being in fact only existing payable, or transferrable by aid of foreign laws within the jurisdiction of the foreign courts, formed in fact local assets which could not be administered in any other country.—[*Bayley B.* The executor may get the money abroad, and transfer it there according to the *English* laws of administration. The *English* and *Scotch* laws differ as to distribution to next of kin. Now if a deceased was domiciled in *Scotland*, is his *English* funded property to be distributed by the *English* or *Scotch* laws? (a)]—Every act declaring the *English* stocks to be personalty, shews they would otherwise be realty. The Marquis of *Anandale's* case, (b) was a question of domicile; so in *Somerville v. Somerville*, had the domicile of Lord *Somerville* been confessedly in *Scotland*, the question of succession to his personal estate would not have arisen; but upon the whole evidence, the intestate's domicile was held *Scotch*. It follows that these statutes having made *British* perpetual annuities personalty *quoad* succession, it could not be contended that they should go to the executor or administrator according to the law of *Scotland* on that subject. The office of executor is at an end as to this property, after transfer to the legatees in the different countries where it lies.—[*Bayley B.* The transfer of the residue will be sufficient, if by law the executor is bound to pay legacy duty.—] It has not paid probate duty and is not liable to pay legacy duty unless possessed by the executor in this country. Now when, if ever, it reaches this country it will be appropriated to the legatee;

(a) See *Somerville v. Somervilles*, 5 Ves. 750. (1801.)

(b) Viz. *Bempde v. Johnstone*, 3 Ves. 196.

whereas in *Logan v. Fairlie* (a), the residuary estate of a testator resident in *India*, was found in *England* in the course of administration, and *before* any specific appropriation had been made, and was therefore held liable to legacy duty. On the contrary, in *Haye v. Fairlie* (b), it was held on the same will that where an appropriation of the legacy in *Indian* securities had been made by the executors in *India*, the interest of that legacy so invested, was held not liable to legacy duty when remitted to *England* for the use of the legatee.

Thirdly, supposing the property to be personal where it is situate, then, though the words of the schedule of 55 Geo. 3. c. 184. are general with respect to succession to personal estate, the act by its title seems only to contemplate that species of estate in *Great Britain* (c).

The *Attorney-General* and *Amos* in support of the rule.—It is considered that this stock, if personalty, follows the testator, who was domiciled here, and would be therefore liable to pay the legacy duty. It has been dealt with as personalty by the testator, whose will is attested by two witnesses only (d); by the executor, in granting powers of attorney to receive and invest the dividends abroad; and by the government of the United States, who have suffered the executor to enter his name in their public books on behalf of the legatees. Then the executor should shew this to be real estate by the laws of the several countries. The clauses making

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(a) 2 Sim. & Stn. 284. *Sir John Leach v. C.*

(b) 1 Russ. 117. *Lord Gifford, M. R.*

(c) 55 Geo. 3. c. 184. is intituled "An act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to personal Estate upon Intestacies, now payable in Great Britain; and for granting other Duties in lieu thereof."

(d) *Quære*, if a will so attested would not pass real property in *France* and *Russia*, if not in the *United States*?

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*English* stock pass as personalty, are inserted *pro abundanti cautellâ*; for that cannot be a rent-charge chargeable on land, for which there is nothing but the consolidated fund without power of distress or other remedy by the stockholder; and a mortgage in fee, though a chattel real, is personal in the hands of an executor (a). The difference of *Logan v. Fairlie*, and *Haye v. Fairlie*, from this case is, that here the testator was domiciled in *England*; and the Vice Chancellor's decision in the first case turned on his opinion, that the funds had not been appropriated abroad, but remained in the hands of the executor's agent in this country. Other cases show that where the property is here, probate and administration must be taken here, though the executor and legatee reside abroad; for they obtain the property here. By the first legacy duty act, 36 Geo. 3. c. 52. legacies payable out of personalty were only made liable to duty; but now by 55 Geo. 3. c. 184. those payable out of realty are included. The title of that act affords no rule of construction, not being part of the act (b), and the words of the first section, and of Schedule, Part 3, though so general as to include property in all countries, wherever the testator possessed it, must have the reasonable construction of applying only to parties domiciled here, and subject to our law. Though the duty is imposed on parchment or paper containing the receipt, yet by 36 Geo. 3. c. 52. s. 28. the executor and legatee are liable to heavy penalties for discharging or receiving a legacy without taking a receipt; and section 6. provides that legacy duty shall be payable on "delivery, payment or other satisfaction" of any legacy or residue. Thus the duty is payable on any mode in which the "payment, &c." of a legacy may be made, as in this case, by power of attorney, &c. The executor deals with this stock in *Great Britain* as

(a) See Patch on Mortgages, 135, 136. Toller on Executors, 183. 188.

(b) Hardr. 324. Lord Raymond, 77.

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personalty, by an act under which alone the legatees can procure it abroad, and when received by them there accordingly, the testator's residue has been "paid, delivered, satisfied and discharged," within 55 Geo. 3. c. 184, Schedule, Part 3, and 36 Geo. 3. c. 52. s. 6. The circumstances that the legacies have been or will be satisfied abroad, affords no answer to the claim of legacy duty; for though the transfer is effected there by the ministerial act of the executor's agent, the *causa causans* of such transfer is the power of attorney executed here by the executor; nor does the claim of legacy duty depend on the country where the legacy is received, but on that where it is appropriated, *Logan v. Fairlie*. Legacy duty may be payable where the legacy has been paid out of this country, for 48 Geo. 3. c. 149. s. 45. provides for stamping receipts for legacies signed out of *Great Britain*. Here the act of appropriation by the executor in this country was the signing the power of attorney for transfer of these stocks. The jurisdiction of the ordinary, where a bond is situate in *England*, as excluding other ordinaries for the purposes of probate or administration, does not apply to the relations of different countries, nor is it denied that the executor would be liable if the property was in bonds situate abroad. Had the debts been too large to be satisfied by the assets in this country, the executor would have been compelled to get in these foreign stocks, and to bring them here to pay the debts, in which case his liability would be clear. The rule is as laid down by the Master of the Rolls in *Somerville v. Somerville* (a), that the succession to personalty is regulated by the law of the country in which the owner was a domiciled inhabitant at the time of his death, without regard to the place of the birth or the death, or the situation of the property at that time. So in *Pipon v.*

(a) 5 Ves. 786.



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*Pipon* (a), and *Thorne v. Watkins* (b), it is said that foreigners would never make investments in our funds, if they were to be distributed in a manner different from the customs of their own countries. In the *Countess da Cunha's* case (c), the testatrix having been domiciled in *Portugal*, bequeathed the produce of a sum in the *English* funds to a minor for life, and administration was granted to that minor, the wife of a minor, on proof of the law of *Portugal*, by certificate (d) of four *Lisbon* advocates that minors might administer there. In *Dowdale's* case (e), on a plea of *plene administravit*, it was said, if the executors have goods of the testator in any part of the world, they shall be charged in respect of them. The *lex loci rei sitæ* only applies to the descent of realty. Thus a person born before the marriage of his parents, though legitimate in *Scotland*, cannot succeed to lands in *England*. *Doe d. Birtwhistle v. Vardill* (f).

ALEXANDER L. C. B.—The arguments in this case, though of ability and zeal proportioned to its importance to the parties, from the sum at stake, have not raised any difficulty in my mind. It seems to me that legacy duty must be paid upon those stocks, according to the true meaning of the stat. 55 Geo. 3. c. 184. That act imposes a duty on legacies and shares of personal estate, which attaches the moment they are paid. The duty is a charge upon the substance of the personal estate belonging to the intestate or to the testator, which is to be handed over to the legatee, and the transaction on which it is to be paid is to be evidenced by the re-

(a) Ambl. 26. Blunt's Edit.

(b) 2 Ves. 35. Cas. Temp. Hardw. by Ridgway, 172.

(c) 1 Hagg. R. New Series. Sir John Nicholl, Prerog. Cant. Hil. 1828.

(d) See *Ex parte Cridland*, 3 Ves. & B. 90.

(e) 6 Rep. 46. b.

(f) 5 B. & C. 438. and see *Brodie v. Barry*, 2 Ves. & B. 131.

ceipt, stamped according to the act. Then the question is, whether the circumstances of this case bring the legatee, the executor, and the estate within the descriptions comprised in this act. In the first place, it must be personal estate. I agree entirely, that the circumstances stated in these affidavits prove it to be personal estate, because the executor has taken it, and dealt with it as such, by authorizing its delivery over to the legatee. Then the subject matter is clearly within the act of parliament. It is said that the persons concerned in this transaction are exempted from this act. The 55 G. 3. c. 184. enacts, that every personal or moveable estate shall be charged with these duties upon all legacies and successions, and then goes on to charge particular sums upon those legacies and successions according to their amount or value; the words of the schedule are general, "any person," but this act must be construed, *quoad* legacies, as confined to Great Britain. In the 36 Geo. 3. c. 52. sect. 1. passed before the Union, the same phrase is used; both acts are intended to apply to the same persons, viz. to every subject of the country, unless from particular circumstances they might be considered exempt. Thus, when subjects of this country die in India, and their estates are delivered over to the several legatees there, this act was not intended to apply; but I do not doubt, that the reasons given by the Vice-Chancellor in *Logan v. Fairlie*, were satisfactory, and justified under the particular circumstances of that case, but it required those particular circumstances, to bring the particular legacy and payment within the operation of the act. But it never can be doubted that the act was meant to include the estate of a subject of this country domiciled in *England*, and whose executors are also living in this country, or that the persons claiming under him, and receiving part of that estate, are subject to contribute to the revenue of

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this country under these acts. It is contended, that it is not liable, because the duties on probate and administrations would not have extended to this particular fund; perhaps not; but that makes no difference in this case. It is so expressed in the act, that the duty on the probate is only imposed in respect of that fund, which the executor or administrator is to obtain in a province of this country by force of that probate or administration obtained in *Canterbury*, for instance; so that, though there may be a great personal estate in the county of *York*, the duty upon that estate is not paid till an administration is taken in the province of *York*, and *vice versa*; and it is only upon the recovery of those sums in those parts of the country where the probate is granted by force of that particular probate, which by our constitution is confined to particular provinces, that the duty is payable for where 55 Geo. 3. c. 184. Schedule, Part III. directs the letters of administration, it says, "Where the estate and effects for or in respect of which such probate, letters of administration or confirmation respectively shall be granted or expedited," evidently confining the charge upon the probate to those particular estates to be recovered of right by force of that administration; but when it speaks of the legacy duty, it is charged upon the amount of the estate itself, to be handed over upon the receipt which the executor, to save himself from the penalty of 36 Geo. 3. c. 52. s. 28., ought to take before he pays the money.

I cannot doubt, therefore, in this particular case, that legacy duty is chargeable upon this property, because, in point of fact, it is under the administration of the executor; and though he is not bound to take out a probate or administration, in order to get at it, still it is by force of the interest he takes under his testator's will that it is disposed of; he passes it over and hands it over to the legatee; whether he is a pecuniary or

residuary legatee, it is transferred to him by virtue of the executor's act. Thus it is the very case which it was the intention of this act to fix with the duty. I am of opinion, therefore, that this property is, without doubt, liable to the legacy duty.

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BAYLEY B.—From the first moment I knew any thing of the state of facts in this case, it appeared to me to be perfectly free from doubt. It is the case of a will made by a *British* subject domiciled in *England*, which is to be executed by an *English* executor, and to operate upon that which, in my opinion throughout, is *English* personal property. For the executor it was pressed, that this was to be considered as being real property in the country in which it was ; but there is nothing in any part of the affidavits to show that that was the character properly belonging to it ; but some reliance was placed upon a supposed analogy between the case of this property and property in the *English* funds, which in their creation might originally be considered as being real, and descendible to the heir, but which very soon afterwards were considered as being merely personalty. It does not follow, because the *English* funds were originally considered as real property, that the *French*, *American*, and *Russian* funds were also so respectively considered ; and it would be for the owner of the property who insists that that is the character which belongs to it, to show that fact to the Court. But the circumstances that the foreign governments suffered the name of the executor to be introduced in the books, and permitted him to deal with the fund, following his direction as to the payment and investment of the dividends, satisfied my mind that it is considered as personal property in the place where it is payable. If it is personal estate, in what respect can it be considered

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different from personal property abiding in this country? The amount of the dividends may be payable in the foreign cities, in which by the constitution of these funds, the dividends are payable, but the place where the thing is payable or transferrable is not material, as when once ascertained to be personal estate, the rules of law, with regard to its not as being at the time locally situate in this kingdom, must be ascertained.

Now the cases from *Bruce v. Bruce*, (a) to *Somerville v. Somerville*, in the House of Lords, clearly shew the rule that personal property follows the person, without being in any respect to be regulated by the *situs*; and that if in any instance the *lex loci rei sitæ* has been adopted as the rule by which the property is to be governed, it has been improperly done. Wherever the domicile of the owner is, there the property is to be considered as situate; and in *Somerville v. Somerville*, where there was stock in the funds of this country, which were at least as far local as any of the stocks now *sub judice*, there was a question whether the succession to that property should be regulated by the *English* or *Scotch* rules. A question there arose between two different domiciles, but the Master of the Rolls held that the proper domicile was in *Scotland*, and having ascertained that, the conclusion he drew was, that the property in the *English* stocks was to be regulated by the *Scotch* mode of succession. Personal property is always liable to be transferred, wherever it may happen to be, by the act of the party to whom it belongs; and there are cases ascertaining a point bearing by analogy on this case, viz. that if a trader in *England* becomes bankrupt, having debts due to him or other personal property abroad, the assignment under the commission of bankrupt operates on the property, and effectually

(a) 2 Bos. & Pal. 229. n. Dom. Proc.

transfers it, at least as against subjects of this country, owing obedience to the bankrupt laws. This property, therefore, appears to me to be *English* personal property.

If then it be such, reducible into possession by an *English* executor, so that he may have it in its full value in this country, why is not the legacy duty to attach upon it? The argument was strong, that if debts had existed of an amount which the *English* personal property would not have paid, it would have been the duty of the executor to have sold the foreign stock, and to have brought the proceeds into this country, or he would have been guilty of a *devastavit*. The question as to *bonum notabile* is essential only to ascertain the *situs* of property, and to ascertain out of what limits the probate which is to clothe the executor with the means of acting shall issue. But *Bruce v. Bruce* decides that the *situs* determines nothing, as it prevails for the time only, and the executor has the power of changing it, and of getting the property into his own country. Now the probate duty only applies with reference to the *situs* of the property within the limit of the probate. The duty, with reference to the administrations in the two provinces of *England*, will be regulated by the amount of property in each, but if there is other property abroad, with reference to which no *English* probate may be essential, that will not be taken into the amount of duty paid either upon the *Canterbury* or *York* administration. *Logan v. Fairlie*, and *Hay v. Fairlie*, do not bear on the present question, because there the party was domiciled in *India*, and not within the limits in which the duties of this act operate. The legacy acts are co-extensive with the limits of this kingdom only, and do not extend to the territorial possessions of the crown in *India*. Therefore in neither of those cases did the question arise, whether the legacy

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duty was payable on the whole of the property left by the testator. This being the case of a man having an *English* domicile, all his property of this description is considered *English* personal property.

GARROW B.—The will and codicil under which the legatees claim show, that the testator intended to give his property as personalty, and therefore subject to the demand of legacy duty, for each is attested by two witnesses only. (a)

VAUGHAN B.—It appears to me that the magnitude of the stake, rather than any difficulty in the case has suggested the resistance made to this claim. The short point to be considered is, Is this or not to be considered the personal estate of the testator? From the affidavits it appears that it was treated as such by all parties,—by the testator, by the executors who claimed it as their estate, and by the government in *America*, who received and acknowledged the claim so preferred. Then if it is personal estate it must be distributed according to the law of the country where the owner was domiciled.

Rule absolute.

(a) Two witnesses are necessary to a will of *English* stock, 33 Geo. 3. c. 28. s. 15. 35 Geo. 3. c. 14. s. 16., but Lord Thurlow held that where it is not so bequeathed, it devolves on the executor in trust for those entitled to the personal estate under the will, for the will directs how the stock shall be applied, though it does not bequeath it. This doctrine was approved by Lord Eldon in *Ripley v. Waterworth*, 7 Vesey 440. 452.

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**T**ROVER for oatmeal. Conversion in lifetime of testator. At the trial before *Bayley B.* at the last *York assizes*, the following appeared to be the facts of the case. On 16th *February*, 1829, defendant held the oatmeal for *Evers*, who then gave defendant an order for its delivery to *Haigh* for a debt of 700*l.*, which order *Haigh* delivered to defendant, who accordingly transferred the oatmeal in his books into *Haigh's* name, but it remained in the defendant's warehouse on *Haigh's* account. On the 13th *April*, *Evers* gave another order for delivery of this same oatmeal, among other articles, to testator *Mellin*, for a debt, and by the agreement then made, *Mellin* the testator was to be at liberty to sell the oatmeal at a certain price within the first three months, and if that price could not be obtained, then to dispose of it for such sum as could be got. A few days after, *Mellin's* book-keeper carried the order to defendant, who assented to the order as to the other articles, but as to the oatmeal, said, "Have you got *Haigh's* order? I have *Evers's* order to hold for *Haigh*. Get me *Haigh's* order, and I will transfer it to *Mellin*. I will not deliver it to any one without letting *Mellin* know. When *Haigh* gets his demand from *Evers*, I will transfer to *Mellin*." The agreement was also shewn to the defendant, but he did not transfer to *D.*" *B.'s* claim on *A.* being afterwards reduced to a sum a little above the value of the goods, *B. bonâ fide* gave a delivery order for them to *A.*, which was handed by him to *C.* who, on a subsequent demand, refused to deliver to *D.* without an order from *B.* in his favour, which order was never given. Held that *D.* had no right of property sufficient to maintain trover against *C.*; for *B.* having the property when *A.* granted the order to *D. bonâ fide* revealed that property in *A.*

*A. (Evers)* being indebted to *B.* (*Haigh*) gave him a delivery order for goods held by *C.* a wharfinger (defendant *Kelshaw*). *B.* assented to the order, and *C.* transferred the goods to *B.* in his books. *A.* continuing indebted to *B.* and being also indebted to *D. (Mellin, plaintiff's testator,)* gave him a delivery order for the same goods. *D.'s* agent demanded them from *C.* who said "I have *A.'s* order to hold for *B.*; when *A.'s* debt to *B.* is settled, I'll transfer to *D.* Get *B.'s* order and I'll

*Quere.* Whether the above refusal would be evidence of a conversion?



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not read it, and refused to bind himself in writing, to transfer to *Mellin*, in the event of *Evers's* debt to *Haigh* being satisfied. *Evers* went to defendant, stating that he had discovered a mistake in his account with *Mellin*, and that *Mellin* was indebted to him, and that defendant was not to obey the order to deliver to to *Mellin*, which was in his, defendant's possession. *Evers* continued indebted to *Haigh*, but on 1st September, his debt was reduced to 113*l.*, the oatmeal in defendant's hands being then worth 108*l.* *Haigh* on that day gave the defendant an order to deliver to *Evers*; on the same day the defendant received this order from *Evers*, who desired him not to deliver except to his, *Evers's* own order. After this, *Mellin's* book-keeper demanded the oatmeal from defendant in his master's lifetime; but he refused to do so, saying, "I have *Haigh's* order to deliver to *Evers*. Get *Haigh's* authority and I will transfer to *Mellin*." The book-keeper said *Haigh* had refused such an order. On 26th Sept. a demand was made by *Mellin's* attorney, who offered the defendant an indemnity for delivering it to *Mellin*. Defendant said, "I think *Mellin* ought to have it, but I'm only a wharfinger; I wish to do right; I have another order from *Haigh*, to deliver to *Evers*, and do not know what to do between the two," and refused to deliver it at that time. No order was ever obtained from *Haigh* to defendant, to deliver to *Mellin*. The plaintiff had a verdict for the value of the oatmeal.

*Brougham*, having obtained a rule to set aside the verdict, and enter a nonsuit on two grounds, First, that the plaintiff had established no right of property in the oatmeal: Secondly, that there was no conversion, citing *Alexander v. Southey* (a),—

(a) 5 B. & A. 243.

*F. Pollock* and *Dundas*, now shewed cause.—The original order had received an irrevocable authority, as the party to be benefitted, and the wharfinger who had the possession, were consuant of it. *Israel v. Douglas* (a), *Williams v. Everett* (b). It may be admitted that every such order would not be irrevocable: thus, if a man consign goods to an agent to be sold for the benefit of a third person, not consuant of the consignment, a new order by consignor before the communication by the agent to the third person, is a revocation; for the directions of the consignor did not constitute an appropriation, but were only a mere mandate revocable at pleasure by his subsequent disposition of the property. *Scott v. Porcher* (c). In *Yates v. Bell* (d), there was no privity between the party to be benefitted, and the holder of the chattels for his benefit. So in *Williams v. Everett*. But here there being good consideration for the second delivery order, it was given personally by *Evers* to the party to take the benefit, *Mellin*, who went to the defendant who had the possession of the goods; the defendant acknowledged the delivery note, saying, in effect, that he would keep the oatmeal for *Mellin*, and subject to the claim of *Haigh*. The destination thus given, could not be afterwards altered, and after the order was delivered to the wharfinger, he became *quasi* a trustee for the person entitled to the proceeds, and bound to hold the goods for him, no transfer in the books being necessary. *Harman v. Anderson* (e). *Lucas v. Dorrien* (f). Here the wharfinger assented, subject to an arrangement between *Evers* and *Haigh*, which was afterwards effected, and defendant should then have handed over the goods to *Mellin*; a contract might have been alleged to deliver on request on *Haigh's* claim to the goods being discharged.—[*Bayley B. Haigh*

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(a) 1 H. Bla. 239.

(b) 14 East, 582.

(c) 3 Merivale, 662. See 8 B. &amp; C. 452, 454.

(d) 3 Bar. &amp; Ald. 643.

(e) 2 Camp. 242.

(f) 7 Taunt. 279.

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gave up to *Evers* the order he held from him, having at the time a further claim on the goods.—] By acknowledging to hold the oatmeal on account of *Mellin*, the defendant attorned to him, and could not afterwards allege that it was not his property. *Stonard v. Dunkin.* (a) *Hawes v. Watson.* (b)—[*Bayley B.* In *Hawes v. Watson*, the property passed by the former owner's delivery order, and a transfer note was signed by the wharfingers, who thereby acknowledged their former holding at an end.—] Here *Mellin* adopted *Evers's* act done for his benefit, and the defendant, as holder of the goods, was the agent as well of *Mellin* as of *Evers*. *Bailey v. Culverwell.* (c) The second order for delivery to *Mellin* carved out a second interest in him, in the subject of this action.— On the second point: Do the acts of defendant amount to a conversion? *Haigh's* order having been discharged, between *Mellin* and *Evers* the question turns on the amount of debt due by *Evers*: between *Mellin* and *Kelshaw* it turns on the terms of defendant's bargain with *Mellin*, and whether sufficient was done to inform defendant of *Mellin's* claim. No objection was made that no tender of warehouse rent was made to defendant. (d) [*Bayley B.* the general refusal denying the right is sufficient without such a tender.] Then *Alexander v. Southey* (e) applies, shewing that unqualified refusal after demand is nearly always conclusive evidence of a conversion.—[*Bayley B.* But there, if the servant had said he had applied to the Insurance Company, for permission to deliver the goods, and then refused to deliver them, that might have been evidence of a conversion.]—Refusal to deliver is a tortious act.—[*Bayley, B.* There is no case that a refusal on an offer of indemnity is a conversion.]—Here the wharfinger absolutely refuses to deliver, but he might have inquired as to the

(a) 2 Camp. 344.

(b) 2 B. &amp; C. 545.

(c) 8 Bar. &amp; Cr. 448.

(d) See *Harman v. Anderson*.

(e) 5 B. &amp; A. 248.

state of the accounts respecting these goods.—[*Bayley B.* If he had inquired of *Haigh*, he might have found why he made that order to *Evers*.]—In *Thompson v. Trail* (a) the captain of a ship had by bill of lading undertaken to deliver tin to the vendee at *Leghorn*. The tin having been shipped, vendor, in order to stop it *in transitu*, required the captain to give it up, but he assigned the bill of lading as an excuse. This was held sufficient evidence of a conversion.—[*Bayley B.* The conversion there turned on the insufficient reason for not giving up the tin.]—Here the plaintiff gave defendant a good insight of his claim, and the latter did not doubt as to the ownership, as was the case in *Green v. Dunn*. (b)

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*Brougham* having been elevated to the office of Lord Chancellor and a peerage, since obtaining the rule,—

*Milner* was heard in support of it.—The general ground for a nonsuit is, that no right to the oatmeal could pass to the plaintiff under the second delivery order given him by *Evers*, for the property had passed to *Haigh* under the first delivery order from *Evers* to *Haigh*. That was accepted by the defendant, who transferred the goods into *Haigh's* name in his books, and assented to by *Haigh*, for whose benefit it was intended. It therefore became a perfect and absolute disposition of the property. The subsequent order by *Evers* was a mere nullity; for at law, in grants of personalty otherwise than by will, the first taker takes absolutely, and no second charge can be created to take place in expectancy. (c) So in order to pass any chattel as an heirloom beyond the first taker, otherwise than by will, or special custom, the intervention of a trustee is necessary. (d) No remainder can be limited even by the same

(a) 6 B. & C. 26. (b) 3 Camph. 215 n. (c) See 2 Bla. Comm. 398.

(d) See the cases collected, Hargrave's note to Co. Lit. 18 b.

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instrument, after a prior absolute gift. Thus, where personality was bequeathed by will to A. and his heirs male, the estate limited being an estate tail, the whole property vested in A. (a)—[*Bayley* B. So if personality be limited to A. for life, and B. for life, A. has the whole property.]—In the class of cases cited on the other side, of *Israel* v. *Douglas*, (b) and *Everett* v. *Williams*, (c) ending in *Scott* v. *Porcher*, *Yates* v. *Bell*, and *Wedlake* v. *Hurley*, (d) no interest had vested in the parties for whose benefit the orders were given. Here the whole interest was in *Haigh*, at the time of granting the second order: till it vested in him, the order, being a mere mandate, was revocable, as appears from *Scott* v. *Porcher*.—[*Bayley* B. Here the transfer made to *Haigh* as a security for a debt, with a right of sale, is a pledge merely. Could not *Evers* alienate his right to redeem? (e)]—In this case, on receiving the second order from *Evers*, defendant refused to bind himself by writing as to the oatmeal, or to act upon it, but said, “Get *Haigh*’s order and I’ll deliver up the goods.” In all the cases last mentioned, a kind of inchoate legal right to the goods begun when the order was sent to the agent to transfer the goods to the purchaser, though, till that right vested, the order was revocable by the principal to his agent; but no such inchoate legal right could here accrue to *Mellin*, where the whole property was in *Haigh* at the time. None of the cases cited shew that the legal property could vest, where the property in the chattel had passed out of the grantor, for they are all between the owner of the property and the single party to be transferred to. The argument will come to this: whether a bailee of goods can be made a trustee for a great number of persons consecutively? A

(a) *Seale* v. *Seale*, 1 P. W. 290.

(b) 1 H. Bl. 239.

(c) 14 East, 582.

(d) 1 Cr. &amp; Jer. 83.

(e) See *Price* v. *Seaman*, 4 B. & Cr. 525. *Anstey* v. *Mardon*, 1 New B. 133. *Patch* on Mortgages, 178.

wharfinger would then be bound first to decide on the conflicting claims of any number of different parties, who had charges on the goods, and then be liable at law for any mistake of their various equities. But all the cases have hitherto turned on the mere question, In whom did the property reside? and the defendant having obeyed the original owner's order in the first instance, by transferring to *Haigh*, could look no further, and it was to *Haigh's* order alone he was to pay observance. But the rule ought to be absolute on the peculiar undertaking of defendant—"Get me *Haigh's* order and I'll give up the goods."—[*Bayley B.* That order would have been a complete transfer.]—*Haigh* retained his legal property in the oatmeal till the 1st of *September*, and had then a demand due from *Evers* upon it exceeding its value. On that day he, having a right to give it what destination he pleased, makes an order to defendant to deliver to *Evers*, the defendant being no longer *Evers's*, but his agent. Then could the defendant have refused to obey such an order given by *Haigh* to any third person, though entirely for benefit of *Evers*?—[*Bayley B.* Suppose *Haigh* had on that day personally taken the goods from the defendant and given them to *Evers*, could *Mellin* have maintained trover against the defendant?—] Not till the debt due from *Evers* to *Haigh* had been paid.

Secondly, if *Mellin* had no property in the oatmeal at the time, here is no conversion, for the defendant, after stating his doubt of the plaintiff's right to the property, refuses to give it up till he has the order of the party whom he believes to be owner; *Green v. Dunn.* (a) In *Isaak v. Clarke*, (b) Lord Coke held, if a man find my goods, and on demand of them answer that he knows

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(a) 3 Campb. 215 n.

(b) 2 Balstr. 312. Bull. N. P. 46 a. And see 4 M. &amp; S. 259.

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not, whether I am the true owner, and, therefore refuse, this is no evidence of a conversion, if he keep them for the true owner. If *Mellin* had the property property in the oatmeal at the time, still the making a condition that *Haigh's* order should be obtained is no conversion. The agreement, entered into in *April* between *Evers* and *Mellin*, (a) by which this, among other articles, was to remain in defendant's hands for three months by way of mortgage to *Mellin*, having expired, it was natural for him to have doubt what to do. He was entitled to satisfactory information as to the property. *Haigh* might have been applied to or brought to the spot by *Mellin* to declare the true ownership; *Alexander v. Southey*. (b)

As to the offer of indemnity by plaintiff, that having been refused, plaintiff is not exonerated from proving his title to the goods. Formerly, in case of a bill lost before due, it availed; but now unless its destruction be proved, the holder is obliged to go into equity, as a court of law will not inquire into the sufficiency of the indemnity. (c)

BAYLEY B.—This rule must be absolute for a non-suit. Indemnity ought not to be taken by a stakeholder, if by so doing the rights of either party are varied; for he should act indifferently between them; and the defendant's refusal to act on the indemnity offered him, does not vary this case before us, or give a right where there was none before. My judgment proceeds on the first question, viz. whether the property in this oatmeal was so vested in *Mellin* as to entitle him or his representatives after his death to maintain trover. Now the right of property is necessary to maintain that action. Here

(a) This agreement was held admissible as part of the *res gestæ* on the day *Evers* gave the order to *Mellin*.

(b) 5 B. & Ald. 248.

(c) *Pierson v. Hutchinson*, 2 Campb. 211. 6 Esp. 126. S. C. Ex-parte *Greenway*, 6 Ves. J. 812.

the property being originally in *Evers*, he, in *February* 1829, to cover a debt of 700*l.* due from him to *Haigh*, gave *Haigh* a delivery order for it, which was acceded to by the defendant *Kelshaw* as binding on him, to hold the oatmeal for *Haigh*. The state of things remaining the same, *Evers*, who also owed money to *Mellin*, gives him an order to defendant to deliver this oatmeal among many other goods. This order being carried to the defendant by *Mellin's* book-keeper, defendant accedes to it as to the other goods in his hands, but refuses to sign any written consent to hold for, or deliver the oatmeal to *Mellin*. His expressions, however, shew a proper willingness to do what might be right as between *Mellin* and the goods: he said he would not transfer it without *Haigh's* order; but that he would not deliver it up without letting *Mellin* know, and that when *Haigh* got his demand from *Evers*, he would transfer to *Mellin*. Now though *assumpsit* might have been sustained on that promise, trover will not. The sum of the defendant's expressions amounts to this.—“The property is in *Haigh*, I have bound myself to him, and will assent to transfer to you on *Mellin's* account when you get an order from *Haigh*.”

It has been pressed on behalf of the plaintiff, that though no order is obtained from *Haigh*, yet the words used by defendant were an undertaking to deliver to *Mellin*, when *Haigh's* debt was satisfied. But there is no evidence that that debt has ever been satisfied, and the words might mean that defendant would transfer on the discharge of *Haigh's* debt, and receiving his order to deliver. But *Haigh* deals with the goods after the order from *Evers* to deliver to *Mellin*, not by merely tearing, extinguishing, or recalling that order of *Evers* under which he held them, but by giving a new order to defendant for delivery to *Evers*, to place the defendant in the same situation as to *Evers*, in which the defendant then stood with respect to himself, *Haigh*.

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This would not be the course adopted had he merely wished to withdraw his lien for the 113*l.* due to him; and the probability is, that he intended not to benefit *Mellin* but *Evers*, and might wish to prefer the latter by giving him a control over this property, so as to sell it to greater advantage, as free of all demands upon it, in order to raise money to pay the 113*l.* due. That sum is 5*l.* more than the full value of the property in question, that being only 108*l.*, so that at all events, *Haigh* must have a larger demand on *Evers* than the value of the goods would satisfy. The circumstances under which the defendant was ready to transfer the property to *Mellin*, viz. the payment of *Haigh's* charge on it, are not shewn to have taken place, and the condition is unexecuted either in terms or substance.

When goods are in an agent's hands, an order from the principal to deliver them to a third person is not sufficient to vest the property in such third person, unless the agent assents to the order, and the agent is only liable to his principal for non-compliance with the order; *Israel v. Douglas*.(a) Here the mere order of *Evers* in favor of *Mellin*, did not vest the property in him. Then, did the defendant assent to the order, and in what manner? Conditionally; and the terms on which he assented were not carried into execution.

GARROW B.—Though a wharfinger may bind himself to hold goods for the benefit of a third person, yet the defendant in this case did not assent so to hold the goods in question, for the use of *Mellin*, considering that on some future examination the order from *Evers* to *Mellin* would be found inoperative as to this oatmeal.

VAUGHAN B.—As this action is founded on the proof of property in the plaintiff, he must first shew that affir-

(a) 1 H. Bla. 239.

matively, in order to draw the right of possession after it, and next he must prove a conversion. But here the plaintiff has not shewn the right of property to reside in him. The facts are difficult, but the sum of the case appears to be, that, in *February* 1829, *Evers*, the owner of some oatmeal, then in the hands of defendant, a wharfinger, gives a delivery order for it to *Haigh*, to whom he then owes 700*l*. This order is handed to the defendant, who, thereupon, transfers the oatmeal in his books to the name of *Haigh*. By this acceptance by defendant, *Evers's* property vested in *Haigh*. Then in *April*, *Evers* being indebted to *Mellin* in a sum of 1100*l* gets *Evers* to give him also a security, by an order for delivery of some other articles, as well as this oatmeal, so that it is attempted to incorporate it with the other articles for *Evers's* debt to *Mellin*. The defendant, on seeing this order, undertakes to hold the other goods for *Mellin*; but as to the oatmeal, says, "I'll hold it for you after *Haigh's* debt is satisfied. By *September* that debt is reduced to 113*l*., and by a new *bonâ fide* agreement between *Evers* and *Haigh*, the latter thinks it right to re-transfer his oatmeal to *Evers*, from whom he had received it originally. Now where was the legal obligation to deliver? *Kelshaw* accepts this order, but says, "Only get an order from *Haigh* and I'll deliver the goods." *Mellin* never gets such an order, but *Evers* does. Then was not the refusal conditional, and was the condition complied with? A small balance would still be due to *Haigh*, the whole oatmeal being only worth 108*l*., and the 5*l*. difference would always have remained due to *Haigh*.

The property was first vested in *Haigh*, and was then revested in *Evers*. But it never was in *Mellin*. Next as to the conversion. The case is very distinct from *Alexander v. Southey* (a), where a servant's refusal to de-

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(a) 5 B. & A. 248.

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liver up goods of plaintiff without his master's directions, was held insufficient to make him personally liable. My judgment proceeds on the other point, that the plaintiff has made out no property in himself whereon to found his action.

BOLLAND B.—After hearing the arguments at the bar, I am of opinion that this rule must be made absolute. The question is whether there is such a property in *Mellin*, as to entitle his executors to bring trover; for any other remedy they may have against *Kelshaw*, on his undertaking not to deliver up the property without acquainting *Mellin*, is no subject of inquiry here. It seems that both *Mellin* and *Haigh* having claims on *Evers*, *Haigh* gets a priority of the pledge of their goods for his debt which is not now extinct. He then lodges his order with the wharfinger in such a way as to entitle him to have that property in liquidation of his debt, or to bring trover against the wharfinger. Till the 1st September nothing was done to vest the property in the oatmeal in *Mellin*; then *Haigh* having the sole property in it, and a charge on it of 113*l.*, transfers the whole to his debtor, the value being 108*l.* only. The right of transferring it at will being in *Haigh*, it makes no difference that he transfers to *Evers*, who had previously deposited it with him as security for his debt, and *Haigh's* right of property at the time excludes all sort of property in *Mellin*. It was argued by Mr. *Pollock*, that *Haigh* and *Evers* had colluded together by a new arrangement to shut *Mellin* out; and if *Haigh's* debt had been satisfied, that might have been possible; but as he had a claim on the property, I see no such motive of collusion as would probably over-rule his own interest. His motive might have been to clothe the property with a better title in the person of *Evers*, so as to obtain a more advantageous sale than could be had for it if sold

while under the discredit of conflicting claims, circumstances which are well known to local dealers in any particular article.

Rule absolute.

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GILL, Gent. One, &c. v. LOUGHER.

Nov. 24th.

THIS was an action for an attorney's bill, tried at the last *Devonshire* assizes, before Mr. Baron *Vaughan*. The principal witness was an inspector of hawkers' licences, who acted as occasional clerk to the plaintiff, an attorney at *Plymouth*. In 1825, defendant requested the witness to send a letter to one *Adams*, for payment of a debt of 1*l.* 18*s.* Witness took such a letter to *Adams*, who denied owing any thing to defendant; witness told the defendant the borough court of *Plymouth* had no jurisdiction over sums below 40*s.*, and advised him to go to an attorney; defendant requested witness to go to the plaintiff and inquire as to the power of the borough court; the witness said he saw the plaintiff, who desired him to tell defendant his only way was to sue out a writ in a superior Court; defendant on hearing this from witness, and without seeing the plaintiff, signed the following paper tendered him by the witness: "Mr. *Gill*,—Sir, please to sue *R. Adams* for recovery of the inclosed bill of 1*l.* 18*s.*" The plaintiff's bill, when produced, contained no item for taking the defendant's instructions to sue *Adams*. A writ was accordingly sued out against *Adams*; the cause went on as far as declaration and particulars of demand, when, at *Lougher's* request, it was put an end to. It was shewn that he was at the plaintiff's office once, but not before the writ

*A.*, an attorney, sued out a *quo minus* at suit of *B.* against *C.* for 1*l.* 18*s.* without receiving personal instructions from *A.* to sue, or ascertaining the nature of the evidence in support of his claim. The cause proceeded, till on *C.'s* obtaining an order for particulars of demand, *B.* called at *A.'s* office to stop the proceedings. Held, that *A.* could not recover the amount of his bill against *B.*, who had not had the benefit of his judgment as to suing out the writ.

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was sued out, or till he pressed for the discontinuing the action against *Adams*. No proof was given of the existence or jurisdiction of the borough court of *Plymouth*. 1*l.* 5*s.* had been paid into Court. The plaintiff had a verdict for 8*l.*—On a previous day in this term, a rule *nisi* for a nonsuit or for a new trial was obtained by Serjt. *Edward Lawes*, on the ground that the plaintiff ought to have seen the defendant, and taken his instructions before issuing the writ, and to have advised him on the subject of the costs of an action in a superior court. *Kenward v. Jones*, (a) *Wellington v. Arters*, (b) *Allison v. Rayner*. (c)

*Fraser* shewed cause.—In *Allison v. Rayner*, the objection to the plaintiff's recovering on an attorney's bill was, that he had not proved the fact of his advising the defendant, as assignee of an insolvent's estate, to call a meeting of the creditors, or to obtain the approbation of the commissioners before suing for a debt due to the insolvent; and it was held, that it lay on the plaintiff to shew affirmatively, that he had done all that his duty required, by advising the defendant that he would be liable to pay the costs of the action out of his own funds, if he proceeded without consent of the creditors. But here the defendant was informed that he must sue in a superior court.—[*Bayley B.* He was not so informed by the *plaintiff*; and the county court might have disposed of the claim.]—This Court has a clear jurisdiction over this action, though for less than 40*s.*; and though a rule to stay proceedings might be granted, (d) it would be discharged with costs on shewing that the inferior court had no jurisdiction; for the smallness of the sum is no reason why the plaintiff is to lose his debt, if it cannot be recovered else-

(a) 4 T. R. 495.

(b) 5 T. R. 65.

(c) 7 B. &amp; C. 441.

(d) See 4 T. R. 495. 5 T. R. 65.

where, *Eames v. Williams*. (a) Every cause is intended to be within the jurisdiction of a superior court, but the reverse is the rule as to inferior courts, *Peacock v. Bell* (b). It does not follow then, that the borough court of *Plymouth* has jurisdiction, and in the absence of proof, judicial notice will not be taken, that the process of the county court runs within the borough. In *Hind v. Harris* (not reported) the action was for a guinea, and a rule to stay proceedings was obtained on the surmise that the plaintiff should have sued in the borough court of *Plymouth*; but it was answered by affidavits, that that court had no jurisdiction till the sum exceeded 40s. and that the county court process did not run into the borough. — [Bayley B. This Court will take judicial notice of the county court, as having jurisdiction in suits under 40s., and as respects writs of false judgment. The limit of its jurisdiction is usually that of the county; where the work is done in a county the law will recognize the county court; but here there is no evidence whether it was done in *Devonshire* or *Plymouth*.]—The plaintiff's affidavits shew that both parties lived in *Plymouth*, and that the county court had no jurisdiction there.—[Bayley B. The rule was not moved for on affidavits respecting the jurisdiction of the county court in *Plymouth*, as it might have been, therefore the plaintiff's affidavits cannot be now received.]—It lay on the defendant to shew that the plaintiff should have sued *Adams* in another court, and there is no evidence that the cause of action against *Adams* arose within *Devonshire*, so as to make the county court at all applicable.

*Edward Lawes*, Serjt. contra.—No instructions to sue are charged for in the bill, nor was the plaintiff directed to sue in any particular court. The plaintiff should have

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(a) 1 D. &amp; R. 359.

(b) 1 Saund. 74 n.

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advised his client of the risk he incurred in suing in this court for 1*l.* 18*s.*, and cannot recover a bill incurred under instructions taken by such a person as the witness, and not from the client himself. In *Jacks v. Bell* (a), an action of assault, an attorney had taken instructions for the action, after the party had received part of the fine imposed on an indictment for the same act; and Lord *Tenterden* observed to the plaintiff's attorney, that it was his duty to dissuade his client from bringing such an action.—[*Bayley B.* There the attorney, having received instructions to sue, would have recovered his costs, though a farthing's damages only were recoverable.]—There is no evidence whether the work was done within the jurisdiction of either the county or borough courts.

*Cur. adv. vult.*

25th Nov.

**BAYLEY B.**—This was an application to enter a nonsuit, on the ground that the debt sued for was under 40*s.* and might have been sued for in the borough court of *Plymouth*; but as it did not appear in evidence at the trial, that the cause of action arose within the limits of the borough where the parties resided, there is no ground for a nonsuit. Nor is the other point, which occurred to the court during the argument, respecting the jurisdiction of the county court, available for that purpose, as it was not taken at the trial. This is an action by an attorney for his bill, and it is the duty of the court to protect the client against his attorney, where their protection is in justice required. The plaintiff's witness having been employed on a former occasion to recover a debt of 1*l.* 16*s.* for the defendant, was afterwards employed to get this sum from *Adams*. (The learned Judge here went through the facts.) That action against

*Adams* was put an end to on his refusing to compromise, and the present is brought to recover 8*l*. for the business done in the course of that action. Though the defendant was once at the office of the plaintiff, the facts show that when the writ was originally sued out, the plaintiff had no communication with him, but acted on the paper of instructions which the witness had called on the defendant to sign. In some instances the personal interview of attorney and client may be impracticable; but cases may exist where it is the duty of an attorney to see and confer with his client before suing out the writ. The claim against *Adams* being small and disputed by him, was such a case. Considering the situation in which the witness stood as usually acting for attorneys, and too probably in this way, it was more especially the plaintiff's duty to have seen *Lougher*, and to have inquired from him whether he had any witness to prove the debt which was thus disputed, and had the answer been satisfactory, that would have sufficed; but if the plaintiff took on himself, merely from the instructions received from this witness, to sue out the writ without an interview with the plaintiff, he did it at his peril. *Allison v. Rayner* does not apply, for preliminary steps were there necessary by law before the plaintiff could sue. Negligence in the conduct of a cause is a defence to an action for the attorney's bill, if it has been such that the client has by it lost all probability of benefit from the business done; *Templer v. M<sup>c</sup>Lauchlan* (a). There are some other cases which, though they do not go the whole length of the present, yet furnish grounds for our judgment on its peculiar circumstances. In *Hopkinson v. Smith* (a) the plaintiff, an attorney, and a person who had been his clerk, but was not an attorney, lived five miles apart. The latter practised in

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(a) 2 New. R. 136.

(b) 1 Bing. 13. 7 B. M. 237. S. C.



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the name of the plaintiff, which, however, was not on the door of the office, and did not appear in many of the practitioner's transactions. The plaintiff came to the office once a week, received a third of the profits, and personally did part of the business in a cause for which the other had received instructions; yet was not allowed to recover his bill, because the client had not the benefit of his judgment as an attorney. But that case does not furnish so clear a principle as *Ex parte Whatton (a)*. There an attorney had sent writs to a bailiff on his request, without knowing any thing of the parties or circumstances. The court of King's Bench, though they did not consider the case to be within the 22 G. 2. c. 46. s. 11. for the purpose of striking the attorney off the roll, declared, that as such a mode of proceeding would wholly deprive the client of the attention he ought to receive from his attorney, it would be severely visited by them if repeated.

In this case of a disputed debt of 1*l.* 18*s.* the expence of a writ being in the first instance two guineas, there can be no doubt of the attorney's duty to have stated that fact to his client, and to have satisfied himself as to the evidence which could be adduced. If that was not satisfactory, he should have told him, that he could not in prudence be suffered to sue out a writ. But it is not till after instructions for declaration given, and delivery of declaration, that the cause of action is enquired into; the last charge in the bill being "attendance on you when you said you would proceed no longer, and wished me to see the defendant's attorney and put an end to the proceedings." My opinion is, that it is the duty of the court, with a view to the protection of clients, not to let the present verdict stand. If the plaintiff will not accede to a *stet processus*, or to a

(a) 5 B. & C. 824.

reference to the master to see whether, at the period of suing out the writ, the plaintiff had made such inquiry from the client respecting the evidence in support of his claim, as a careful attorney should have done, the costs of the trial to abide the master's decision; there must be a new trial.

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GARROW, B.—The first item to be expected in this bill would have been—"Attending you and taking instructions in your claim against *Adams*." The next, "Instructions to sue." Where the regular course is thus pursued, the client has the assistance of an attorney's advice, which would frequently be against the suing for a trifling sum. Where, however, an attorney never sees his client, but on obtaining instructions of such a kind as these from such an instrument as the witness, writes up at once to his agent in *London* to commence an action, the client has no such assistance; now the first actual item in the bill here sued for is, "Letter to *Adams* for payment of 1*l.* 18*s.* due to you, and threatening an action if not paid;" next are the letters to the agent, and the charge for the *quo minus*, after declaration and particulars of demand are called for; and it then occurs to the *London* agent, that the evidence in the action must be inquired into; in consequence of which the attorney and client come in contact for the first time after the whole expence had been fruitlessly incurred.

VAUGHAN and BOLLAND, B*s.* concurred.

*Fraser* prayed time to communicate with his client on the proposition of the Court.

See *Ingram v. Wyatt*, 1 Hagg. Rep. (New Series, 441.) Prerog. Cant. cor. Sir John Nicholl; and *Wright v. Nuttall*, 10 B. & C. 499.

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Nov. 16th.

PITT against ELDRED.

A *distringas* will not be granted without personal service of the *venire* pursuant to 7 & 8 G. 4. c. 71. s. 5. unless on facts which almost irresistibly shew that defendant kept out of the way to avoid that service.

**COWLING** moved for a rule *nisi* for a *distringas*, on default of appearance on the *venire facias*. The *venire* with the notice to appear annexed to it had not been personally served on the defendant, pursuant to 7 & 8 Geo. 4. c. 71. s. 5. (a)

The affidavit stated that the *venire facias* was regularly issued against defendant at suit of plaintiff, returnable on 6th November last, and that a true copy thereof was delivered (at the same time shewing the original writ) to one *Marsden*, at his dwelling-house, where deponent was informed and believes that defendant was residing. That deponent used all means in his power to serve defendant, personally, with the writ of *venire facias*, having attended at the dwelling-house of *Marsden*, on 7th July, and twice previously, for the purpose of serving defendant personally, but without meeting with the said defendant. That on the first day of deponent's attendance, he informed a person, whom deponent believed to be the daughter of *Marsden*, of the purpose of his calling, namely, to serve defendant with the writ of *venire*, when the deponent made an appointment to attend again on the following Monday morning, at half-past nine, in order to effect such service, the defendant not being then within. That deponent did attend according to such appointment, but could not find defendant to effect such service. That he made another appointment with the wife of *Marsden*, to call there again on the following morning, for the same purpose, at half-past nine; that

(a) This act regulates, but does not take away this ancient practice of the Exchequer. See the cases collected, Tidd's Practice, 9th Edit. 114. 165. Supplement, p. 61.

he did attend accordingly, but did not find defendant. That on both days this deponent was told that defendant was from home, and could not be seen. That deponent verily believes defendant kept out of the way to avoid being served: concluding with the allegation of the notice to appear, subjoined to the *venire*, according to 7 & 8 Geo. 4. c. 7. s. 5.

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BAYLEY B. — This affidavit is insufficient, in not stating facts, from which it may almost irresistibly appear, that the defendant keeps out of the way to avoid being served with the process. The affidavit does not disclose the answer of the daughter of the person at whose house the defendant is said to reside, when the deponent called there in order to serve the writ on the defendant, nor any reason for disbelief that the defendant was absent when the deponent called. Where as in this case personal service is expressly required by statute, it cannot be dispensed with in a case which does not go beyond strong suspicion. A reasonable activity to effect the service prescribed must appear to have been used. A proper mode would be, to call one day, and after mentioning the purpose of the call, to fix a time for making another; but in this case there is no satisfactory evidence that the defendant lodged in the house where the party called, and attempted to serve the writ. This rule had it been granted, would only be a rule *nisi*.

The other Barons concurred.

Rule refused. (a)

(a) The same doctrine was laid down in *Taylor v. Smith*, Nov. 25th, and *Jackson v. Massey*, Nov. 29.

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Nov. 29th.

BEGBIE v. LEVY.

An indorsee may recover against the acceptor of a bill dated on a Sunday, when there is no evidence that the bill was accepted on that day.

GARROW, B. delivered judgment.—This case having been argued in Trinity term, my brother *Bayley* has no share in our decision, but my Lord Chief Baron (a) concurs with the rest of the Court in the opinion I am about to pronounce.

This was an action by the indorsee of a bill of exchange, dated 27 *December*, 1829, drawn by one *Johnson* on the defendant, *David Levy*, payable to the drawer's own order, at three months after date, accepted by the defendant, and indorsed by the drawer to the plaintiff. The verdict was for the plaintiff.—In support of a rule for a nonsuit, it was contended, that this bill being drawn on a *Sunday*, must be presumed to be accepted on that day, and was, therefore, a contract void by 29 Car. 2. c. 7. s. 1. That statute enacts, "That no person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day." The law was otherwise before this statute; for a sale at a fair held on the day on which it had been immemorially held, was not avoided by that day falling on a *Sunday*. *Comyns v. Boyer*. (b) But we find no evidence to support the position contended for, except from the date of the bill itself; there being no proof when the defendant wrote his acceptance on it, nor does the bill as drawn, contain any words of contract. The drawer's direction to pay to his own order, may be in satisfaction of some by-gone debt to himself, or in order to lend his name to the drawee, but till it was accepted it imposed no obligation on the latter to pay the amount. If any presump-

(a) The Lord Chief Baron was sitting in Equity.

(b) Cro. Eliz. 485. See 1 Taunt. 136.

tion that the bill was accepted on a *Sunday*, should be suffered to prevail, the custom of merchants would be contravened, as the general practice is to leave bills for acceptance on one day, and to call on the next to see if they are accepted. Accordingly at the clearing house, hundreds of bills may be found accepted on a different day from that on which they are drawn. As the drawee must have time for consideration whether the drawer has effects in his hands to justify the acceptance, the probability is that it was drawn on Sunday, and not left for acceptance till the next day. Then upon the authority of *Bloxsome v. Williams* (a), the Court has no difficulty in discharging this rule, for it does not appear that any contract was completed on the *Sunday*, which the defendant was not competent to enter into, notwithstanding the statute; nor, assuming that there was, is it competent to the defendant, who has been guilty of a breach of the law, to set up his own misconduct as an answer to his acceptance in the hands of an innocent holder. The case of *Drury v. Desfontaines* (b), was recognized in the King's Bench in *Bloxsome v. Williams*, and *Fennell and Another v. Ridler* (c); which cases, as well as *Rex v. Whitnash* (d), show that an act, to be illegal within the statute, must be done in the exercise of the party's ordinary calling, and that the statute does not apply to all persons, but to persons having such ordinary calling which they exercise on the *Sunday*. Had the statute intended to prevent the doing of any business on a *Sunday*, it would have enacted that no one should enter into a contract on that day.

Rule discharged.

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(a) 3 B. & C. 232. And see *Saunderson v. Jackson*, 2 Bos. & P. 238.

(b) 1 Taunt. 131.

(c) 5 B. & C. 406. See *Smith v. Sparrow*, 4 Bing. 84.

(d) 7 B. & C. 596. 1 M. & R. 452. 8 C.

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BECK and Others *against* BREE, Clerk.

The word "tithes" in an ancient document creating a rectory, will include composition for tithe as well as tithe in kind, and the meaning can only be explained by subsequent usage in each particular case.

A modus of two-pence-halfpenny an acre is not rank, and rankness is not weighed in very nice scales.

Ancient documentary evidence must be of a satisfactory and conclusive nature in order to overturn a modus, though not traced to a date near as early as that of the documents.

THIS was an issue decided by the Lord Chief Baron sitting in equity, to try Whether from time immemorial a modus of 3*l.* 6*s.* 8*d.* was payable in lieu of the tithes of a district of land called *Allesley Park*, consisting of 327 acres in *Allesley*. At the trial at the last *Warwickshire* assizes before the Lord Chief Baron, the occupiers, as plaintiffs at law, in order to show this sum to have been paid from time immemorial, produced a conveyance of the park dated in 1692, in which it was termed "an ancient park, paying 3*l.* 6*s.* 8*d.* in lieu of all tithes." They also produced the rector's accounts from 1741 to 1826, from which the regular payment of this sum appeared. Proof was also given that no tithe in kind had been taken from the above tract within living memory. The boundaries were shewn to be partly mounds encircling the above tract in *Allesley*, as also about 30 acres in *Stoneleigh*, and partly a stream. Part of this district was woodland. The rector (who was defendant at law), in order to rebut the presumption that such payment was immemorial, made three points: First, that no such payment could have existed at the time of legal memory, and that tithes in kind had been rendered since; Secondly, that *Allesley Park* anciently consisted of only 30 and not of 327 acres as now claimed; Thirdly, (assuming the second point to be proved) that the modus of 3*l.* 6*s.* 8*d.* was rank. In support of these positions, he gave in evidence various documents, of which the following is a summary, and also proved that there were many marks of ancient mounds, &c. within the district, more distinctly to be traced than those stated to be the outer boundary.

1. An Extract of the Register of the Priory of *Coventry*, dated A. D. 1249, produced from the King's Remembrancer's Office in Exchequer. The parties to this instrument were the bishop and archdeacon of *Coventry*,

certain persons on behalf of the prior and convent of that place, (who appeared to be then possessed of the tithes of *Allesley*), and a person by it created rector of the parish of *Allesley*; after reciting the grant of two wastes by the prior and convent to Lord *Hastings*, the lord of *Allesley*, and his assent to the deed, it proceeded to erect the chapelry of *Allesley*, then belonging to the priory of *Coventry*, into a rectory, and to grant to the new rector all the tithes and oblations belonging to that church, excepting "the tithes of *Allesley Park*."

2. An Inquisition taken under a commission issued to ascertain the extent of the crown lands with a view to their taxation, and dated 7 Ed. 1. A. D. 1279, stating, "*Allesley Park*, containing *ex antiquitate* 30 acres, twelve acres being in *Stoneleigh*." This was applied to the defendant's second point, the smaller extent of *Allesley Park* in ancient times.

3. Pope *Nicholas's* Taxation, 19 Ed. 1. A. D. 1291, estimating the whole living of *Allesley* at 12 marks, viz. 8*l.*, but without specifying the number of acres then comprised in it. (The parish was proved to contain *hodie* 3621 acres.)

4. An Inquisition *post mortem* of the patron of *Allesley*, Lord de *Hastings*, dated 6 Ed. 2. 1313, which mentioned *Allesley Park*, as "said with the herbage to be worth per ann. 13*s.* 4*d.*" and also estimated the Lord's castle and garden at 5*s.*, and a *dovecote* at 4*s.*

5. An Inquisition *post mortem* of *John de Hastings*, Lord *Abergavenny*, dated, 18 Ed. 2. A. D. 1325, mentioning a certain park in *Allesley*—the underwood is worth nothing—the herbage is worth 12*s.* for cattle in summer, but no more, as there are wild animals there.

6. The *Inquisitiones Nonarum*, or *Nonæ* Rolls A. D. 1341, 15 & 16 Ed. 3. stating tithe of hay and other small oblations of the whole parish, to be worth, one year with another, five marks, or 3*l.* 6*s.* 8*d.*

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7. The new *Valor Beneficiorum*, or Ecclesiastical Survey, for calculating the value of the first fruits or tenths, 26 Hen. 8. A. D. 1535, stated the value of the living to be 17 marks and a half, viz. 11*l.* 13*s.* 4*d.*

8. Several accounts of the bailiffs of the Lords *Abergavenny*, former owners of *Allesley* park, from the muniment room of that family. In 19 Hen. 7. A. D. 1504, the bailiff charged himself with 8*l.* 3*s.* 4*d.* for agistment of the park, it being demised to a tenant. In 27 Hen. 7. the bailiff charged himself with 16 guineas for a sale of wood; and 18 Hen. 8. A. D. 1527, with 8*l.* 3*s.* 4*d.* for agistment of the park, and 47*s.* for sale of underwood.

9. In 3 & 4 Philip & Mary, A. D. 1556, Lord *Abergavenny*, then ambassador to *France*, demised *Allesley Park* for 21 years at 40*l.* per ann., by a lease reciting a former lease at 20*l.* per ann. The new lease gave the tenant power to cut wood.

10. A mortgage deed of the park for 400*l.* by Lord *Abergavenny* about the same date, stating the park to have been lately inclosed with pales, and laying its value at 600*l.* but not mentioning its acreage. Proviso that the mortgagee should be entitled to the whole premises in the security, on paying 200*l.* in addition to the 400*l.* already advanced.

The plaintiffs had a verdict establishing the modus.

*Goulburn* Serjt. had obtained a rule for a new trial on two grounds: First, that the verdict was against the weight of the evidence, shewing that the whole tract claimed to be covered by the modus, was not a park in ancient times; and secondly, that the Lord Chief Baron, in his charge to the jury, had not given that weight to the documentary evidence for the defendant, which it merited.

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The Attorney-General (*Denman*), Adams Serjt. Boteler, and G. Richards, shewed cause.—This modus being

claimed in respect of a district of land, called *Allesley Park*, and not as a park or farm modus; the plaintiffs need not shew, as part of their case, that the whole tract now known by that name, was wholly, or in part, an ancient park, or enclosed in the ancient times of Lord *Hastings*. The identity of the district is established by the ancient mound and other boundaries encircling the 327 acres in *Allesley*, as well as the 30 in *Stoneleigh*, so that the payment of five marks, or 3*l.* 6*s.* 8*d.* viz. 2*½d.* an acre, on the land in *Allesley*, is not rank. It is difficult to believe that a great feudal baron had wild beasts in only 30 acres of park. The "18 acres in *Allesley*," stated in the inquisition of 1279, probably included the present 327; for juries had a common interest in diminishing the acreage on which their neighbours were to be taxed. For the same reason, inquisitions *post mortem* are inaccurate, as they commonly favored the family in stating its property at a low rate. Thus it is not credible that the Lord *Hastings's* castle and garden should be worth 5*s.*, and the dove-cot 4*s.* As the boundaries said to exist within this park do not continuously encircle any space, they prove nothing. The acreage described in the old documents cannot apply to this tract, but to a small part of it, which alone at that period yielded tithe. Every presumption must be made in favor of the customary payment, which has been admitted to exist unopposed for so long a period. The instrument of 1249, (however it arrived at the King's Remembrancer's Office,) shews the rector to have no claim to tithes of *Allesley Park*.—[*Alexander*, L. C. B. Can a rectory be so created, Lord *Hastings* being no party to the instrument?—*Bayley*, B. Can we say Lord *H.* or the rector are parties?—The assent of Lord *H.* is recited in the deed, and that of the rector may be presumed from the course taken under the deed. The modus might have existed, for the instrument need not mention the nature of the matters to be enjoyed by the

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rector; any lawful composition in lieu of tithe, may be described as *tithe*. A *modus decimandi*, is said to be a particular mode of taking tithe, generally in the shape of a pecuniary payment; yet, as a pecuniary payment, it is tithe, *Bennett v. Neale*. (a) The dictum of Chief Baron Macdonald in *Halse v. Eyston* (b) that the phrase of "*mutuæ decimæ*" used in ancient documents, was strongly against the existence of a customary payment; and of Thomson, B. that where the value of the *tithes* is given in them, it implies a *taking in kind*, are contrary to many cases in which moduses have been established.—[*Vaughan*, B. *Fermor v. Loraine* (c) shews that a lease of *tithes* is not inconsistent with a *modus*.]—The Chief Baron left the inquisition of 7 Ed. 1. to the jury as a document leading to no certain conclusion, but asking them whether or not they were convinced of the possibility of the *modus* having been agreed to in old times, and stating, that if in their opinion the whole park of *Atlesley* then consisted of 18 acres only, the *modus* was at an end. On the inquisition of 6 Ed. 2. 1314, he said 3*l.* 6*s.* 8*d.* for *tithes* was barely possible, assuming all the park to be in grass; that part was woodland, and the grass after a late fall of timber would be worth nothing. Ancient inquisitions are admitted by way of reputation of the state of things in ancient times, to rebut the presumption of an immemorial *modus*, (d) but if they are held evidence of the particular fact so as to overturn usage, the king's silver, or post-fine, being threewentieths of the supposed value of the land, included in a fine, would be conclusive evidence of the value. So the finding by a jury of the value of a sword with which death has been inflicted as laid in an indictment, would be conclusive evidence of its actual value. Pope *Nicolas's* taxation, and the *Nonæ Rolls*, seldom mention

(a) *Wightwick*, 359.(b) 4 *Price*, 419.(c) B. *Vaughan's* Judgment, post.(d) See per Lord Redesdale, *Bullen v. Mitchell*, 2 *Price*, R. 475, &c.

moduses; the ecclesiastical surveys never. (a) The Nonæ Rolls only apply to tithe of lamb, sheaf, and wool. In *Ashby v. Power*, (b) the value of the living in the ecclesiastical survey of Henry 8. was set up to shew the rankness of a modus of 1s. an acre, which was not traced to a date as high as that reign; but the Lord Chief Baron denied that the evidence was conclusive, and said that it was a medium of proof affording inference, and therefore fit for the judgment of a jury on an issue. Such documents are only of weight against a modus, where they shew payment of tithe in kind. Thus, in *Short v. Lee*, (c) proctors' accounts dated in the 15th century, mentioning sales of tithe hay taken as tithe in kind, were held decisive against the modus.

In a *Coventry* case of *Boughton or Warden v. Smith*, a modus was set aside before Lord *Tenterden*, very much on the strength of the public documents of Pope *Nicolas's* Taxation, the Nonæ Rolls, and the Ecclesiastical Survey; but contradictory terriers were there produced in support of the modus, one of them stating tithe to be taken for the whole parish, and another that a modus had been claimed for every parishioner by counsel's advice. The bailiff's accounts, if unfair, would have stated every deduction; but while the bailiff charges himself for the agistment of the park, no debit appears for the tithe, or any account whether it was paid by the tenant, which, if taken in kind, would have been the case; or whether any part of the park was in Lord *Abergavenny's* own hands. (d)

(a) See 1 Phillipps on Evid. Chap. 6.

(b) Scacc. M. 1781. 3 Gwill. 1238.

(c) 2 Jac. & W. 464. Rolls, 1821.

(d) Some unreported cases were cited, in which ancient inquisitions, &c. were said to have been unsuccessfully relied on against moduses, or had been held of small importance. The case of the *Stalman* chapelry, *Lancashire*, an issue directed by the Vice Chancellor of that county, assisted by *Chambre* and *Allan Park, Js.*, from the Equity side of the Duchy Court to the Court of C. P.; the *Wyndham* or *Wimborne* case of a greater and smaller park, tried before Lord *Tenterden*; and the *Milborough* case, *Fairfax v. Johnson*, cor. the Lord Chief Baron in Equity, M. 1830.

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*Goulburn Serjt., Amos, and Pennington, contra.*—The question is not, whether the land called *Allesley Park* is tithe free; but whether the modus pleaded has existed from 1189 or not? A payment of 3*l.* 6*s.* 8*d.* was too important a sum in 1249 to have been omitted in the instrument of that date which grants the remaining tithes, and reserves the tithes arising from this tract of land. The rankness of the payment is evidence against its existence in those early times. Five marks (3*l.* 6*s.* 8*d.*) must have been paid for the “eighteen acres in *Allesley*,” mentioned in the inquisition of 1279; while by *Pope Nicholas’s* taxation in 1291, the whole living of *Allesley*, now 3621 acres in admeasurement, was only valued at twelve marks or 8*l.* A payment of 3*l.* 6*s.* 8*d.* would be out of proportion to 8*l.* for the larger number of acres: and was probably settled at the reannexation of the tithes on the dissolution of the monasteries. The Lord Chief Baron, in his charge to the jury, attached little weight to the extent of the park or the alteration of the boundaries, but it was of the essence of the inquiry whether the tract called the park did immemorially consist of 327 acres, or of thirty acres only of which twelve were not in *Allesley*. (a)—[*Alexander L. C. B.* Had this been claimed as a *park* modus which would have been liable to be destroyed by disparking, (b) proof, that though the original boundaries were destroyed, the modus was still claimed as comprising the whole district, would have been strong against such a modus.—*Bayley B.* might there not have been a smaller inclosure of thirty

(a) Taking 18 acres of *Allesley Park*, to be in *Allesley*, according to the inquisition of 1279, 7 Ed. 1. the acre must have been eighteen times its present size to bring that quantity of land to 324 acres. By Stat. incert. temp. *De Admensuratione Terræ* (in some books cited as 23 Edw. 1. c. 6. it is enacted, when an acre of land contains 10 perches in length, it shall contain 16 in breadth, when 11 in length, then in breadth 14½ perches and ¾ of a foot, &c.

(b) *Stockwell v. Terry*, 1 Ves. sen. 15.

acres within an outside and larger inclosure?]

The reservation of *tithes* in the document of 1249 must be taken in its primary sense of tithes in kind, till contradicted by some proof of cotemporaneous date, shewing that it only meant a composition in lieu of tithes. (a) *Halse v. Eyston*. (b) Those old inquisitions which were taken under the authority of royal commissions, describe the particulars as cottages, villeins, &c. with great minuteness, and were most important to the early monarchs; they are, therefore, evidence of a nature wholly different from inquisitions *post mortem*. The site only of the lord's mansion was valued by the jury, who, with a view to the then value of the dovecot compared with that of the castle and garden in the hands of a tenant, might justly estimate the profit of the former, at a nearer proportion to the latter than, under the changed circumstances of the present age, is obvious. The bailiff's accounts coincide with the public documents, and are therefore of great weight, so supported and uncontradicted by proof of cotemporaneous custom to the contrary.—[*Bayley B.* The documents are produced to rebut a presumption arising from the long usage, but none of them negative the existence of the payment before 1693, or that its origin was not proper. Their true construction is very uncertain.]—The documentary evidence taken as a whole, shews that the *modus* contended for could not have existed at the time of legal memory.

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ALEXANDER, L. C. B.—I am of opinion that this rule should be discharged. For the plaintiffs at law, who are defendants in equity, being the occupiers insisting on the *modus*, as clear a usage for about 140 years was proved at the trial, as in my experience I have ever known; nor did it proceed from persons who were

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(a) The L. C. B. left this instrument to the jury as inconclusive on this point, and therefore, to be explained by subsequent usage.

(b) 4 Price, 419.

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merely occasional inhabitants on one side, or incumbents for a short time on the other; but acquiescence was proved, not only of the incumbent, but of the owner of the advowson, who had a more than usual interest in sustaining the emoluments of this living, the same person being both incumbent and patron; besides which, the advowson was since purchased with a knowledge of the existence of this usage. No stronger case against the claimant of the tithe can be stated. The rules of law, however, entitle him to set aside such a usage on making out a proper case, supported by such satisfactory evidence as, if not amounting to demonstration, should at least be of that particularly distinct and satisfactory kind, which is due to the possessions of men who bought and sold, and accommodated themselves to the usage so attempted to be overturned. (a) Upon such distinct evidence I have more than once been obliged to set aside very ancient usages, even without reference to a jury, when I found from authentic records manifest proof that there was a time, since the time of legal memory, at which those usages had not prevailed; but in those cases the expressions contained in the ancient instruments could not mislead, and I was perfectly satisfied that the usages contended for had a commencement comparatively late, that is, after the time of legal memory. A respect is due to very ancient customs, and they will not be set aside without very cogent evidence. The defendant's evidence in this cause is directed to three points, any one of which, if made out, would have entitled him to overturn this usage. The first being, that tithes have been rendered in kind since the time of legal memory; the second, that the boundaries of *Allesley Park* could not be those now insisted on; the third, that the modus set up is rank, that is, so large a sum of money in respect of the district for which it is pleaded that it could not

(a) See 4 Gwillim, 2007, last edition.

have the ancient origin contended for, but must have had an origin at a period when money was of a less value than it bore at the time of legal memory.

On the first point, the document of 1249 is adduced, using the expression "*tithes* of the park." The document is unintelligible to me, but probably might have been explained by documents not produced by either party, but which are, as I understand, known to both. To those who see this document only, it appears entered into by persons without authority, and with a view to do what by law no one can do, its general effect being to allot the tithes of the parish to the rector, which he would have had without that document, unless it had been apparent that they were vested in some other ecclesiastical body. But the tithes of this park are by this instrument withdrawn from that allotment. Besides the above general objections to this document, the word "*tithes*" is of equivocal meaning, either meaning tithes in kind, or that which may be in lieu thereof, viz. the ecclesiastical emolument or payment in lieu of them; nor does there appear any thing in the object of the instrument which required its framers to express with any great distinctness the ecclesiastical emoluments which the rector was not to have; they meant only to say that the rector should not have those tithes, whatever they were, whether tithes or moduses, and that it was to operate in exclusion of his tithes to that extent. It is not an exclusion of his *rights* over that district; and it did not signify how that was expressed, provided it pointed out the ecclesiastical emoluments which, without that provision, he would necessarily have had. In my opinion, then, the construction put upon it, of establishing liability to tithes in kind, totally fails.

On the second point, that the boundaries insisted on could not be the ancient boundaries of the park, — it is

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undoubtedly a rule of pleading on these subjects, that the persons who set up a modus for any district, must describe accurately the extent and limits of the land to be covered by it, as they must be taken to be cognizant of the spot from which it arises. There the modus is said to cover the *Park of Allesley*. If the issue was, whether there was an ancient park at *Allesley*, bounded as described by the pleadings and witnesses, I should think the documents produced to disprove that part of the defendant's case worthy of the highest attention of a jury, though still not conclusive; and which ever way the verdict had been, I should have had great difficulty in setting it aside. One of those ancient documents stated this park to be of 30 acres in extent; but I think the argument raised on that expression proceeds on a misconception of the issue, which is not whether this was an ancient park, but whether this district, now called *Allesley Park*, was covered by the modus. That has been proved by shewing certain actual boundaries for the district within which no tithes have been rendered, and a payment of 3*l.* 6*s.* 8*d.* has been made. Now this must be shewn to be a mistake, in order to justify our setting aside this ancient usage. The origin of this district may have been, that the whole of the demesnes in the hands of Lord *Hastings*, or those noble persons whom he succeeded, had been covered by this payment, and that though a smaller district was *de facto* turned into a park, the whole district so covered originally, or by degrees, all went by that name. This conjecture appears to be a sufficient answer to the documents produced, which, without adverting unnecessarily to many points stated in argument respecting them, appeared to me to contain very inaccurate accounts of what they purported to describe.

On the third point, Whether this modus is rank, much attention is due to the arguments raised on this

subject from the documents produced. But all judges who have considered this subject, have ever held that rankness is not to be weighed in very nice scales, and have frequently observed that the interest of the original great land-holders, or their veneration for the church, might prompt them to give a money payment far beyond the real value of the tithes. Now, though there must be limits to such reasoning, the argument of rankness arises chiefly from the small limits which are supposed to be covered by the *modus*; but I have already expressed my opinion, that the evidence adduced to shew the smallness of those limits was unsatisfactory. If, therefore, they *may* have been more extensive, the argument of rankness is defeated. The same observation arises as to Lord *Abergavenny's* bailiff's accounts. These relate to a park only; but considering, as I do, this *modus* as covering a more extensive district than that which was the park, strictly so called, the arguments become nugatory, as the accounts refer to the park only. As no sufficiently strong evidence has been given to satisfy me that this is a bad *modus*, this ancient usage must be supported, and the rule must be discharged.

BAYLEY B.—I concur entirely in discharging the rule. The issue is, whether that which now passes by the name of *Allesley Park*, and which contains 327 acres, is or is not covered by a payment of 3*l.* 6*s.* 8*d.* a year, at a given period in the year. How long that, now called the Park, has had that name attached to it, or whether the whole of it originally passed by that name, we have no means of judging decidedly; but for the last 130 or 140 years the whole district in dispute has been so called. Whether all of it was, in ancient times, a park or only a portion, the rest being the park estate, owned and probably occupied with it, is doubtful on the evidence. The

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case having been decided by a jury, we are required to send it down again, because they are said to have come to a wrong conclusion on certain documents produced before them ; but whatever their weight may be, unless we can see clearly that the weight of evidence preponderates against the verdict, or that some plain ground is furnished by such documentary evidence to satisfy us of its incorrectness, unless there has been some misdirection, we ought not to grant a new trial. Three questions arise. 1. Has this payment been made beyond the time of legal memory ? 2. Has it been paid in respect of these 327 acres ? 3. Is it or not disproportioned to what may be supposed the value of the tithe of this district at the time of legal memory as to be bad on the ground of rankness ?

On the first question, the document of 1249 is the only evidence from which payment of tithes in kind, within the time of legal memory is to be inferred, except in one instance arising on the bailiff's accounts. But neither the patron nor the lord of the manor, nor the owner of the estate in question were parties to it. Certain persons appearing to act as commissioners for the priory and convent of *Coventry*, take on themselves to assign to the rector of *Allesley* all the tithes and oblations belonging to that church, with an exception, from the language of which the inference that tithes in kind were payable for this district at that time, is argued to arise. The observation of the Lord Chief Baron on it was, that though the expression *tithes* occurred in that document, it did not of necessity import tithe in kind, but might be satisfied with a customary payment in lieu of tithes, if it did in fact exist at that period. In judging of the meaning to be attached to any instrument ancient or modern, it is material to consider the amount of information which the persons who speak by it are likely to possess on the subject, and accordingly how far

they would be likely to confine themselves to more accurate, or indulge in more loose expressions. All that the commissioners do here, is to give the rector every thing with the exception of the tithe of the Park of *Allesley*, on which they will not act, but leave it as they found it; that does not import that tithe was payable in kind; for if, for 60 years before then, there had been a bargain, by which the money payment of 3*l.* 6*s.* 8*d.* was to be made in lieu of the tithe of this park, it would be natural to use this word *tithes*, because it was not material to the object of that document to distinguish the manner of payment, whether in kind or by a money payment.

The next document, dated 1279, was relied on to shew that the payment, though it might have been immemorial, had not been made for 327 acres, but for the smaller quantity of 30 acres, *Allesley Park* being there described of 30 acres *ex antiquitate*, twelve thereof being in *Stoneleigh*. Whether that be an accurate description of the quantity of land, then called *Allesley Park*, or whether the acre then was the same as the modern acre (*a*), we do not know. Many objections were made on the improbability of the small size ascribed to a park. It was also said, that the same document only mentioned six acres of glebe, there being now 40 acres. Though it may have been since increased, there is no evidence that it has; but the true answer to the document seems to me to be that there might be a park of 30 acres only, but that that did not constitute the full extent of the limits for which the 3*l.* 6*s.* 8*d.* was paid, but constituted a very inconsiderable part of it. I cannot say on this document, that at its date the limits of the land covered by this payment, were of so circumscribed an extent, or that it at all militates against the

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notion that at that time the whole 327 acres were covered by that payment.

The rest of the evidence mostly applies to the question of rankness. This is a farm modus, covering a large tract of land, the patron of the living being therefore taken to be one of the parties to its establishment, (a) and it is not unlikely that he, who on the one hand was to protect his land for all time, and on the other was to have power to confer the living on any object of his personal consideration, should, with a view to the perfect security of both in future, make a liberal compensation to the rector, in the amount given as a compensation for the tithes to which this estate was liable; nor can 2½d. an acre, which this amounts to, be called a large payment. So manifest a distinction appears in allowing for a larger degree of liberality for farm moduses than for others, that 1s. an acre has been allowed for them. In farm moduses, not only the nature of the land but the convenience of passage to it must be taken into account, as well as the ancient value of corn, and a great variety of other considerations. To shew that this sum could not have been an immemorial payment, Pope *Nicolas's* taxation was produced, stating the whole tithe of this parish, now consisting of 3621 acres, at twelve marks, and it was said that 3l. 6s. 8d. being five marks for 327 acres of land, could not have existed at the time of that taxation. But the jury was to consider whether that taxation did or did not accurately state, in this particular instance, the full amount of money which was the value of the living in question: had they drawn a contrary conclusion, I should not have been dissatisfied; but as this document, which affords one of the strongest grounds against the present verdict, was submitted to the jury without any observation calculated in any respect to impeach the conclusion to

(a) 3 Burn's Ecclesiastical Law, by Tyrrhitt, 437.

which they came; it does not furnish ground on which the verdict can properly be impeached. The same observation applies to the Nonæ Rolls and the Ecclesiastical Survey. The first of which follows the taxation of Pope *Nicolas*, and the latter puts the value of the property in question at about seventeen marks and a fraction, thus raising it higher than Pope *Nicolas*'s taxation. Some inquisitions, dated about the time of the Nonæ Rolls, were then produced to shew the value of this district to have been so inconsiderable, that 3*l.* 6*s.* 8*d.* could not then have been payable as a modus. But the value there put on the property is so low, that I am not surprised at the jury's rejection of this evidence. The bailiff's accounts were adduced first to satisfy us, that from the amount of rent with which he charged himself, it is improbable that the whole property could at that time have been such as would make 3*l.* 6*s.* 8*d.* a reasonable compensation for the tithes, and secondly, to raise the inference, that if 3*l.* 6*s.* 8*d.* was payable, the bailiff, in discharging himself in his accounts, would notice that payment, though he debits himself with 8*l.* 3*s.* 4*d.* for the farm and the agistment of the park there demised: the document does not tell us what was the extent of that park, or whether it was the whole 327 acres or not? It must have been the park mentioned in the early inquisitions as of 30 acres, or much smaller dimensions than that which has now acquired the name of *Allesley Park*, containing 327 acres. The extent of agistment of the park then, does not appear, nor does the *agistment* necessarily give to the tenant the sole and exclusive occupation, with all the pasturage and privileges; but might merely give him at certain periods the power to turn in his cattle and take the feed. Was all in pasture, without any hay? Was the lord excluded? All would depend on the bailiff's bargain with the tenant of the agistment. The *agistment* may mean that the

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lord is to have his hay, and may turn in cattle of his own, subject to which reservation the tenant of the agistment should have the power to turn in his own, and take in other persons' cattle. The loose term *agistment*, in our ignorance of the then extent of this park, does not enable me to say distinctly for what the 8*l.* 3*s.* 4*d.* was paid. The argument, that if this payment in lieu of tithe was at that time made, it was natural to expect the bailiff would have discharged himself by shewing he had made it, depends on whether his was the hand to make the payment, or whether the person to whom the agistment was let, or the lord's receiver, paid that sum ; for each of the accounts shews a balance paid by the bailiff to the lord's receiver. The ancient leases and conveyances by way of mortgage, do not afford safe grounds for granting a new trial, as the extent of land they comprised was referable to the obscure question— "What was the extent of the inclosed park at the periods at which they were granted?" If the mortgage deed undoubtedly applied to the whole 327 acres, it would be strong against the present verdict, from the proviso that the mortgagee, who had advanced 400*l.* should be entitled to the whole premises included in his security, on paying 200*l.* more : but the application of that mortgage deed is a matter of doubt. The taxation of Pope *Nicolas*, describing the value of the whole living at twelve marks, the Nonæ Rolls, the Ecclesiastical Survey, and the mortgage, are all substantial evidence against this verdict, but do not furnish satisfactory grounds on which we can pronounce the verdict to be wrong, or that another jury ought not to come to a similar conclusion, or that a contrary conclusion would be what is just between the parties. The rule, therefore, must be discharged.

GARROW B.—It has been urged that the learned

Chief Baron left the jury so impressed with his own opinion on the subject of the weight to be given to the several documents in evidence, that the verdict cannot in fact be considered as that of the jury. But it appears that he did not withdraw them from their consideration, and it was his duty to assist them with his observations, to enable them to come to a right conclusion. Lord *Eldon* constantly held that the verdict of a jury, to whom he had sent an issue for the information of his own conscience, was unsatisfactory to him, unless the presiding judge did so assist the jury, by commenting on the facts and the bearing of the evidence, as well as directing them in point of law. I entirely agree that the verdict ought not to be disturbed.

VAUGHAN B.—I am also of opinion that this rule ought to be discharged. This is an issue directed by my Lord Chief Baron, with a view to informing his conscience, and assisting him in administering the relief to which the parties to this suit as originally preferred, may ultimately become entitled. It was clearly competent to him to have assumed to himself the determination of every matter of fact suggested by the record in equity. (a) But the discreet practice of late years has been, that whenever a reasonable doubt is suggested as to matters of fact relating to tithes, they should be sent to the consideration of a jury. The issue here, whether a certain tract of land comprising about 327 acres, in *Allesley Park*, was or was not covered by this modus or money payment of 3*l.* 6*s.* 8*d.*, involved two questions of fact, to be made out by the plaintiff,—The first, that the money payment set up applied to the identical lands referred to in the proceedings in equity, by the schedule in the map there used :

(a) See on this subject, *Tyrwhitt's* Edit. of *Burn's Ecclesiastical Law*, 454 b. and 454 c.

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the second, that the payment had existed from time immemorial. Now it seems to me that this payment has been established to be immemorial, negatively, by shewing that no tithe in kind had ever been paid within the memory of the oldest witness called, and that there was no reputation that tithe had ever been paid in kind; and affirmatively that this money payment had been made uniformly without interruption for a long succession of years, from as far back as 1693. In my experience I have never seen evidence so clear and cogent on this subject, and upon it, the jury would be called upon to presume that the payment had continued even to the very moment beyond the time of legal memory, unless the most distinct evidence was offered to prove the origin of that payment within a later period.

Then arises the question of rankness of modus, or whether, supposing that the money payment is made out to apply to land called the Park, of the extent of 327 acres, it is to be inferred as too large at 2½d. an acre? Now the documents relied on by the plaintiff to prove the payment to have an origin later than 1189, are Pope *Nicolas's* Taxation, the Ecclesiastical Survey, the Nonæ Rolls, and the bailiff's accounts. The payment and the rankness being matter of evidence, if a jury presumes that the payment existed from time immemorial, rankness would be out of the question, for the amount must have entered into their consideration on the subject of immemoriality. In *O'Connor v. Cookes*, (a) a farm modus of 20*l.* for 400 acres (a shilling an acre) appeared to Lord *Eldon* to be very large. It was pressed on him not to send the issue down, in Lord *Kenyon's* supposed words, to the *prejudices*, not the judgment of a jury. (b) But Lord Chancellor *Eldon* said, he could not so speak of the constituted tribunals of the

(a) 6 Ves. 665, 674.

(b) 5 Ves. 670.

country, and that he should send it down, asking them what they thought, on their consciences, directed by their oaths. The modus having been found by the jury, a new trial was moved for on one ground, among others, that sufficient weight was not given to Pope *Nicolas's* Taxation. Though, unfortunately, different Judges attach different credit to it, I never heard it held conclusive, but left to the jury, with more or less respect, to be dealt with among the other circumstances. The cause went to a second trial, on the statement that further evidence had been discovered, making it questionable whether the district covered by the modus was not a part of another hamlet, and therefore, whether the modus might not extend to a larger district than the 400 acres. The jury having again affirmed the modus — the Lord Chancellor refused an application for a third trial, and made a decree in favour of the modus. (a) The other case I alluded to was *Fermor v. Loraine*, (b) a farm modus, of about 7*d.* or 8*d.* an acre, set up to cover 200 acres, within the vicarage of *Normanton* in *Leicestershire*. There the question of value introduced the Taxation of Pope *Nicolas*, and the Ecclesiastical Survey. The vicar undertook to demonstrate, that tithes had been taken in kind since, and produced a lease of the *tithes* in *Charles* the Second's time. There was a discussion whether a lease of the *tithes* would not be the proper mode of demising or conveying them, even if covered by a modus; but the Court of Exchequer did not consider the evidence sufficient to prevent the case from going to a jury, and the modus was established by the verdict. A new trial being granted, the second verdict was the same, and on application for a third trial, on ground of the jury's prejudices, it was compromised. There, the evidence being stronger on the subject of modus than in

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(a) 8 Ves. J. 534. (b) In Exchequer, cited 6 Ves. 668. 674.

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this case, the Court required a verdict, notwithstanding the ancient documents produced; and in *O'Connor v. Cooke* (a) *Ld. Eldon* having no doubt the modus was rank, acted on this authority in sending that cause to issue. The argument of rankness is therefore disposed of. I am not embarrassed with the consideration that this may not have existed immemorially, though it did cover 327 acres, and amounts to 2½d. an acre only; for the distinction in those cases has been taken between what was called a farm-modus, and a modus for a particular article, (b) in which latter case you may, by reference to books, pretty nearly ascertain the value of the article at the particular time. On the question of boundaries, witnesses were called well acquainted with the premises in the map, who traced the boundaries as far as at this remote period can be expected, shewing the tract called *Allesley Park*; and as Mr. *Boteler* properly observed, we are not tied down to ascertain, whether this was the ancient park or not? The simple question is, Whether the identical land denominated *Allesley Park* was, or was not, covered by this money payment. Though it is suggested that mounds, having the appearance of fences, are thrown up in a particular part of them, which would have much circumscribed the district of land which it at one time contained, that evidence is not contradictory; for there might have been inclosures in the park, in order to take hay. In one inquisition it is stated, that 75 persons were paid regularly for turning hay in the park, which would therefore have been in part inclosed against the incursions of the wild animals said to have been there. Therefore, these internal fences do not appear to me to go any way to negative the supposition, that what is called *Allesley Park* may not have had other boundaries, or to destroy the evidence of those witnesses who have traced them. The local position of the land, the names,

(a) 6 Ves. 674.

(b) See 3 Burn's Ecol. Law, by *Tyrwhitt*, 454. b.

and all the other circumstances, would in my mind induce the conclusion, that the park was of the extent stated; then as these matters have become obscure from the lapse of time, it was for the defendant to shew clearly that the presumption in favor of the modus was wrong, and that he had negatived its existence at the only period to which the law refers its origin. The boundaries, therefore, were in my opinion reasonably ascertained.

The case standing thus on the facts, I am at a loss to conceive what are the objections to the Lord Chief Baron's direction in point of law. It is not often made a subject of complaint, as in this case, that the Judge has not thrown so much weight into the scale as he might have done, but left the jury to form their own opinion, stating his view of these documents, as it was his duty to do. Nothing was stated to which I do not fully assent: as no ground of misdirection is made out, it is not enough that in the weight of evidence some matters preponderate in favor of one, and some in favor of the other party; we must see that injustice has been done by a wrong conclusion of the jury, before we can send the case to a new trial.

Rule discharged.

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## REGULÆ GENERALES.

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### IN THE EXCHEQUER OF PLEAS.

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Michaelmas Term, in the First Year of the Reign of King William the Fourth, and in the Year of our Lord 1830.

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**No. I.—Fees  
of sworn and  
side clerks.**

**No. I.—**In pursuance of an act passed in the first year of his present Majesty's reign, intituled "An Act for the more effectual administration of justice in England and Wales," IT IS ORDERED by the Court, That the several fees hereunder mentioned shall and may continue to be taken by the sworn and side clerks of this court, the same being for duties to be performed by them, as officers of the court, similar to the duties of the other superior courts: And it is further ordered, that in the taxation and allowance of costs, such fees shall be distinguished from and form no part of the fees and charges which shall be allowed to the attornies who have been, or shall be admitted to practise under and by virtue

of the said act, but the same shall be allowed as disbursements.

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*The fees above referred to :*

[These Fees are exclusive of the Master's Fees.]

|                                                                                                                                                                 |           |    |   |   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|----|---|---|
| On process of subpoena ad respondendum                                                                                                                          | -         | £0 | 1 | 6 |
| Filing affidavit of service of subpoena                                                                                                                         | -         | 0  | 1 | 0 |
| Attachment for not appearing to subpoena                                                                                                                        | -         | 0  | 1 | 6 |
| Alias and pluries attachment, each                                                                                                                              | -         | 0  | 1 | 6 |
| One appearance in the paper book for one defendant                                                                                                              | - - - - - | 0  | 1 | 0 |
| For every additional defendant                                                                                                                                  | - - -     | 0  | 0 | 4 |
| On special bail and filing                                                                                                                                      | - - -     | 0  | 4 | 4 |
| For taking bail off the file to produce in court                                                                                                                |           | 0  | 1 | 0 |
| Filing all affidavits (not excepted by act of parliament) postea and inquisitions                                                                               | -         | 0  | 1 | 0 |
| Searching for all writs, affidavits, and processes, each time per term                                                                                          | - - -     | 0  | 0 | 4 |
| Searching for judgment and all matters of record, per term                                                                                                      | - - - - - | 0  | 0 | 4 |
| Office copies of all affidavits and other matters of record, per folio                                                                                          | - - -     | 0  | 0 | 8 |
| Office copies of all rules, per folio                                                                                                                           | - - -     | 0  | 0 | 4 |
| On taking all pleadings out of the the office, 4d. per folio, according to the number of folios marked on the pleading, by the party filing the same, per folio | - - -     | 0  | 0 | 4 |
| On filing declarations                                                                                                                                          | - - - - - | 0  | 0 | 4 |
| Inrolling deeds and other matters requiring to be inrolled, per folio                                                                                           | - - - - - | 0  | 0 | 4 |
| For every warrant of attorney                                                                                                                                   | - - - - - | 0  | 0 | 4 |
| For entering every rule                                                                                                                                         | - - - - - | 0  | 0 | 4 |
| For drawing and copy of every order of court, per folio                                                                                                         | - - - - - | 0  | 0 | 8 |
| For exemplifying a record, per folio                                                                                                                            | - - -     | 0  | 0 | 4 |

1830.

|                                                                            |       |
|----------------------------------------------------------------------------|-------|
| For entering a certiorari out of Chancery                                  | 0 3 4 |
| For acknowledging satisfaction on record -                                 | 0 4 8 |
| For every release - - - - -                                                | 0 2 0 |
| For entering an audita querela - -                                         | 0 3 4 |
| For attending every trial at bar - -                                       | 1 0 0 |
| For every exhibit read at a trial at bar -                                 | 0 1 0 |
| For entering all proceedings on writs of error,<br>per folio - - - - -     | 0 0 4 |
| For enrolling writ of error - - - -                                        | 0 6 8 |
| For office copies of all pleadings when re-<br>quired, per folio - - - - - | 0 0 4 |
| For each writ of supersedeas on an attachment                              | 0 1 0 |

That the several duties for which fees are appointed in the said schedule shall be performed by the sworn and side clerks of the said office or their sufficient deputies or deputy, on the request of the persons now or hereafter admitted to practise as attornies in this court, within the hours and times hereinafter appointed, whereupon such fees as aforesaid shall become payable.

Clerk of  
pleas.

That the several duties heretofore performed by the clerk of the pleas or his deputy, at the instance of the sworn or side clerks of the office of pleas, shall, hereafter, at the instance of, and for the attornies admitted as aforesaid, be in like manner performed by the said clerk of the pleas, or his deputy, on payment of his lawful fees for the same.

Office hours  
in office of  
pleas.

That the said office of pleas shall be kept open for business every day, (*Sundays, Christmas day, Good Friday, Easter Monday, Ascension day, and Midsummer day*, and days appointed for public Feasts, Thanksgiving, or Fasts, excepted) from the hour of eleven in the morning, till three in the afternoon, and from five o'clock in the afternoon, till nine o'clock at night, during term, and for sixteen days after an issuable term, and for ten days

after a non-issuable term, and at other times, till seven o'clock in the evening.

1830.

That in all actions, which before the first day of this present term were pending in this Court, the parties plaintiffs, or defendants, shall and may be at liberty to apply to one of the Barons of this Court, for an order appointing any person who shall then be an attorney of this court, to be his or her attorney in further prosecuting or defending such action, upon undertaking to pay the sworn or side clerk previously employed by him his costs incurred in such action, to be taxed, if required, by the master, and that service of such order on the opposite party or parties, or his or her attorney, shall be sufficient notice to him or them of such appointment.

Appointment  
of attorneys  
in actions  
pending be-  
fore 6 Nov.  
1830.

No. II. — IT IS ORDERED, That the name and address of the attorney issuing any writ shall be indorsed or written thereon, and also that the day, month, and year in which the same shall be issued, shall be indorsed or written on all writs hereafter to be issued in the office of pleas of this Court, and if the same be *mesne* process other than a writ of *subpoena ad respondendum*, a *precipe* or particular of such writ, containing the county into which the same shall issue, the names of every party plaintiff, and defendant therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be so issued, shall be delivered to the clerk or deputy clerk of the pleas, on his being required to sign such writ, which *precipe* shall be duly filed on files to be provided by the said clerk of the pleas, or his deputy, for each term and vacation, according to the county into which the same shall be issued, and if such process be *subpoena ad respondendum*, and process of contempt thereon, and writ of *supersedeas* thereon, a *precipe* shall

No. II.—  
Issue of writs  
regulated.

*Precipe.*

*Subpoena ad  
responden-  
dum.  
Precipe.*



1830.



in like manner be left with the sworn or side clerks, or their deputies, in the office of pleas, containing the names of every party plaintiff, and defendant therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be issued, which shall be kept on a similar file by the sworn and side clerks, to which precepts any attorney of this Court, or his clerk, shall have access on payment of the fee payable in respect thereof.

Copy of *subpana* to be served instead of label, &c.

That a copy of all process of *subpana ad respondendum* hereafter to be issued out of this Court, and of any indorsement thereon, shall be served; and no service thereof shall be effected as heretofore, by service of any label or other minute thereof.

More than four defendants in one action.

That where there are more than four defendants in a joint action to be commenced in this Court, residing in the same county, the whole number of such defendants shall be named in one writ, and if the whole number of defendants shall appear by the same attorney, and at the same time, the names of all the defendants shall be inserted in one appearance.

Recognizances of bail.

That all recognizances of bail in actions in the said office of pleas, when taken or allowed by a Baron, shall be left by the attorney for the defendant or defendants with the sworn or side clerks, or their deputy, in the office of pleas until duly allowed, who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference, which book, shall be open to the inspection of the attorneys so admitted as aforesaid, or their clerks, and notice of such bail-being allowed and left and filed in the said office of pleas, with the names, descriptions, and address of the bail shall be given by the attorney for the defendant or defendants to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail by

the former rules of this Court, and proceedings may be thereupon had for excepting to and perfecting such bail within the times, and in like manner as is and are prescribed by the existing rules and practice of this court, except so far as the same may be altered by the present or any subsequent rule of this court.

1830.

That on every appearance to be entered by the sworn or side clerks, as officers of the said office of pleas, they shall cause to be put the name and address of the attorney at whose instance, and the day on which the same shall be entered, and such appearance shall be entered by the defendant's name by the said sworn clerks in proper books, having an alphabetical index book of reference, entered by the plaintiff's name, to be provided by the clerk of the pleas for each term, which books shall be open to the inspection of the said attorneys admitted as aforesaid, and their clerks without fee or reward.

Appearances  
to be entered  
in books.

That all declarations *de bene esse* shall be filed with the sworn and side clerks or their deputy, and shall be entered in alphabetical order, in proper books for each term, to be kept by them for that purpose, which books shall at all times within office hours be open to the inspection of the persons admitted to practise as attorneys of this court, and their clerks, without fee or reward, and the declaration so filed shall and may be taken out of the office by the defendant or his attorney upon payment of the fees payable in respect thereof.

Declarations  
*de bene esse*;  
entering and  
taking out of  
the office.  
(See p. 161.)

That service of all pleadings, summonses, orders, rules, notices, and other proceedings heretofore served on the sworn or side clerks at their seats in the said office of pleas shall hereafter be served upon the attorney or attorneys of the adverse party or parties, by delivering the same to or leaving the same for him in the manner hereinafter mentioned, and that henceforth no entry of any notice shall be required to be made in any book to be kept in the said office of pleas as heretofore.

Service of  
pleadings,  
summonses,  
rules, &c. &c.

1830.

Attornies'  
names and  
abodes to be  
entered in a  
book.

That the clerk of the pleas, or his deputy, shall forthwith cause to be prepared a proper alphabetical book for the purposes aftermentioned, and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk, without fee or reward; and that every attorney admitted in this Court, and residing in *London*, or within ten miles of the same, shall forthwith enter into such book, in alphabetical order, his name and place of abode, or some other proper place in *London*, *Westminster*, or the borough of *Southwark*, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this Court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid.

Service of  
notices, &c.  
on attornies.

Service of  
notices, &c.  
on adverse  
attorney.

That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered appearance therein, according to the statute, and the defendant shall, by an attorney of this Court, have given notice in writing,

to the attorney for the plaintiff, or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, summonses, rules, and orders, which, according to the practice of this court, were heretofore delivered by the sworn or side clerk of the other party, plaintiff or defendant, be delivered to or served upon the attorney or attorneys of the other party, plaintiff or defendant, and that all notices, &c. shall be so served or delivered before nine o'clock in the evening.

1830.

That one day's previous notice of the time of taxing costs upon rules, orders, town posteaes, and inquisitions, and a copy of the bill of costs, and affidavit to increase (if any) shall be given and delivered by the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice, and that in the cases of posteaes and inquisitions in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation.

Notice of  
taxation of  
costs.

That upon process of *quo minus* and *venire facias* personally served on a defendant, and upon all writs of *distringas* whereupon notice pursuant to the statute 7 & 8 Geo. 4. c. 71. shall be given returnable on any day of the term, the plaintiff shall be at liberty to declare *de bene esse* within eight days after the return thereof, or on appearance, in chief, and if plaintiff declare either conditionally or in chief, in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the defendant shall plead within four days after such declaration shall be filed or delivered with notice to plead accordingly without any imparlance, and in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, the defendant shall plead within eight days after such declaration shall be filed or delivered, with notice to plead

Time for de-  
claring condi-  
tionally on  
writs of *quo*  
*minus*, *venire*  
or *distringas*.

Time for  
pleading in  
town causes.

In country  
causes.

1830.



in like manner be left with the sworn or side clerks, or their deputies, in the office of pleas, containing the names of every party plaintiff, and defendant therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be issued, which shall be kept on a similar file by the sworn and side clerks, to which precipes any attorney of this Court, or his clerk, shall have access on payment of the fee payable in respect thereof.

Copy of *subpœna* to be served instead of label, &c.

That a copy of all process of *subpœna ad respondendum* hereafter to be issued out of this Court, and of any indorsement thereon, shall be served; and no service thereof shall be effected as heretofore, by service of any label or other minute thereof.

More than four defendants in one action.

That where there are more than four defendants in a joint action to be commenced in this Court, residing in the same county, the whole number of such defendants shall be named in one writ, and if the whole number of defendants shall appear by the same attorney, and at the same time, the names of all the defendants shall be inserted in one appearance.

Recognizances of bail.

That all recognizances of bail in actions in the said office of pleas, when taken or allowed by a Baron, shall be left by the attorney for the defendant or defendants with the sworn or side clerks, or their deputy, in the office of pleas until duly allowed, who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference, which book, shall be open to the inspection of the attorneys so admitted as aforesaid, or their clerks, and notice of such bail-being allowed and left and filed in the said office of pleas, with the names, descriptions, and address of the bail shall be given by the attorney for the defendant or defendants to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail by

the former rules of this Court, and proceedings may be thereupon had for excepting to and perfecting such bail within the times, and in like manner as is and are prescribed by the existing rules and practice of this court, except so far as the same may be altered by the present or any subsequent rule of this court.

1830.

That on every appearance to be entered by the sworn or side clerks, as officers of the said office of pleas, they shall cause to be put the name and address of the attorney at whose instance, and the day on which the same shall be entered, and such appearance shall be entered by the defendant's name by the said sworn clerks in proper books, having an alphabetical index book of reference, entered by the plaintiff's name, to be provided by the clerk of the pleas for each term, which books shall be open to the inspection of the said attorneys admitted as aforesaid, and their clerks without fee or reward.

Appearances  
to be entered  
in books.

That all declarations *de bene esse* shall be filed with the sworn and side clerks or their deputy, and shall be entered in alphabetical order, in proper books for each term, to be kept by them for that purpose, which books shall at all times within office hours be open to the inspection of the persons admitted to practise as attorneys of this court, and their clerks, without fee or reward, and the declaration so filed shall and may be taken out of the office by the defendant or his attorney upon payment of the fees payable in respect thereof.

Declarations  
*de bene esse*;  
entering and  
taking out of  
the office.  
(See p. 161.)

That service of all pleadings, summonses, orders, rules, notices, and other proceedings heretofore served on the sworn or side clerks at their seats in the said office of pleas shall hereafter be served upon the attorney or attorneys of the adverse party or parties, by delivering the same to or leaving the same for him in the manner hereinafter mentioned, and that henceforth no entry of any notice shall be required to be made in any book to be kept in the said office of pleas as heretofore.

Service of  
pleadings,  
summonses,  
rules, &c. &c.

1830.

Attornies'  
names and  
abodes to be  
entered in a  
book.

That the clerk of the pleas, or his deputy, shall forthwith cause to be prepared a proper alphabetical book for the purposes aftermentioned, and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk, without fee or reward; and that every attorney admitted in this Court, and residing in *London*, or within ten miles of the same, shall forthwith enter into such book, in alphabetical order, his name and place of abode, or some other proper place in *London*, *Westminster*, or the borough of *Southwark*, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this Court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid.

Service of  
notices, &c.  
on attornies.

Service of  
notices, &c.  
on adverse  
attorney.

That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered appearance therein, according to the statute, and the defendant shall, by an attorney of this Court, have given notice in writing,

to the attorney for the plaintiff, or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, summonses, rules, and orders, which, according to the practice of this court, were heretofore delivered by the sworn or side clerk of the other party, plaintiff or defendant, be delivered to or served upon the attorney or attorneys of the other party, plaintiff or defendant, and that all notices, &c. shall be so served or delivered before nine o'clock in the evening.

That one day's previous notice of the time of taxing costs upon rules, orders, town postea's, and inquisitions, and a copy of the bill of costs, and affidavit to increase (if any) shall be given and delivered by the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice, and that in the cases of postea's and inquisitions in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation.

That upon process of *quo minus* and *venire facias* personally served on a defendant, and upon all writs of *distringas* whereupon notice pursuant to the statute 7 & 8 Geo. 4. c. 71. shall be given returnable on any day of the term, the plaintiff shall be at liberty to declare *de bene esse* within eight days after the return thereof, or on appearance, in chief, and if plaintiff declare either conditionally or in chief, in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the defendant shall plead within four days after such declaration shall be filed or delivered with notice to plead accordingly without any imparlance, and in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, the defendant shall plead within eight days after such declaration shall be filed or delivered, with notice to plead

1830.

Notice of  
taxation of  
costs.

Time for de-  
claring condi-  
tionally on  
writs of *quo*  
*minus*, *venire*  
or *distringas*.

Time for  
pleading in  
town causes.

In country  
causes.



1830.

Render to a  
county gaol.

accordingly, without any imparlance, provided such declaration be filed or delivered on or before the last day of the term in which such process shall be returnable, and rule to plead be duly entered.

That on application by a defendant or his bail or either of them, for an order of one of the Barons of this Court to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made; the state of the proceedings in the cause; for what amount the defendant was held to bail, and by the sheriff of what county he was arrested; which facts shall be stated in the order, and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail, and that on such lodgment and render, a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated without entering any *exoneratur*.

Render of a  
defendant in  
a county  
gaol.

And that if a defendant shall be in custody of the gaoler of the county gaol of any county in *England* or *Wales*, by virtue of any process issued out of any of his Majesty's superior courts of record, he may be rendered in discharge of his bail in any action depending in this Court, in like manner as is hereinbefore provided for a render in discharge of bail, and thereupon the bail shall be wholly exonerated from liability as such bail.

Sittings in  
term.

That hereafter there shall be two days appointed for the trials of causes at *nisi prius* in term in *London*, and the like in *Middlesex*, to be named by the Lord Chief

Baron of this Court, previous to the commencement of each term, and that on such nomination the said Lord Chief Baron shall also appoint the hour at which the Court will sit on each of those days.

1830.

That whenever a plaintiff shall rule the sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule, and that the plaintiff having so ruled, the sheriff shall not proceed on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid.<sup>(a)</sup>

Perfecting  
bail on body  
rule.

That hereafter all special bail shall be justified within four days after exception, before a Baron at chambers, as well in term as in vacation.

Time for jus-  
tifying bail.

No. III.—Whereas, by an act made and passed in the first year of the reign of his present majesty, intituled “An Act for the more effectual Administration of Justice in *England* and *Wales* ;” it is amongst other things enacted, That all the power, authority and jurisdiction of his Majesty’s court of session of the said county palatine of *Chester* and of the Judges thereof, and of his Court of Exchequer of the said county palatine, and of the chamberlain and vice-chamberlain thereof, and also of his judges and courts of great session in the principality of *Wales*, shall cease and determine at the commencement of the said act, and that all suits at law then depending in any of the said courts, shall be transferred to the Court of Exchequer, there to be dealt with and decided according to the practice of the said Court of Exchequer, or of the court from whence the same shall be transferred according to the discretion of the court to which the same shall be transferred, which court shall, for the purpose of such suits only, be deemed and taken

No. III. —  
Recital of  
part of 1 W.  
4. c. 70. s. 14.

(a) See *Ladd v. Wilson*, *supra*, pa. 21.

1830.

Suits at law pending in Courts of Session and Exchequer of *Chester* and Great Session of *Wales*, on 12th *October*, 1830.

Declaring on process served and returnable before or in *Michaelmas* 1830, or before *Hilary* 1831.

*Non-pros.*

Certificate of declaration filed in the Court of Sessions, and proceeding to plead, &c. thereon.

to have all the power and jurisdiction to all intents and purposes possessed before the passing of this act, by the court from whence such suit shall be removed.

This Court doth therefore order, that as to all suits at law depending in any of the said courts on the twelfth day of *October* last past, the same shall be dealt with and decided according to the practice of this Court, unless this Court or a Baron thereof at chambers shall, upon special application upon notice to an adverse party, otherwise direct.

And it is further ordered, that where process shall have been served, and the plaintiff shall not have declared, that the plaintiff shall be at liberty to declare on all process returnable before or in the present term, or before or in next *Hilary* term, or the vacation following the same, as if the same as to all process returnable before the end of this present term, had been made returnable in the present term; and as to all process returnable between the end of the present term and the vacation next following next *Hilary* term, as if the same had been returnable of next *Hilary* term; and the defendant shall appear to such process, or put in bail thereto within eight days after notice of this rule as to writs, the return days whereof shall then be past; and as to writs returnable after the end of the present term, within six days after the same shall be returnable, and the defendant shall be at liberty to give a rule to declare, and in default of declaration to sign *non pros* accordingly.

And it is further ordered, that in all cases in which a declaration hath been delivered or filed in the Court of Sessions, a certificate thereof shall be obtained under the hand of the late Prothonotary, or late deputy Prothonotary of the court in which the same shall be filed, and be verified by affidavit to be entitled in this Court, and such certificate and affidavit shall be filed with the deputy clerk of the pleas without fee or reward, and the

1830.

plaintiff shall thereupon be at liberty to give a rule to plead, and in default of plea to sign judgment in like manner as if the declaration had been filed in this Court, an appearance having been first duly entered in this Court, if the same shall not have been entered in the said court in which such suit was commenced, and each party shall be at liberty to plead, reply, or take any subsequent proceeding, and to rule an adverse party to proceed in such action, as if the same action had been originally commenced in this Court, but that no judgment shall be signed for want of declaration, plea, replication or other proceeding, until a rule to declare, plead, reply, rejoin, &c. shall have been first given in the office of pleas of this Court, and demand of declaration, plea, replication or other proceeding in writing, served on the adverse party or his attorney according to the practice of this Court, so many days before such judgment shall be signed, as the practice of this Court requires upon rules to declare, plead, reply, rejoin, &c.

And it is further ordered, that in case any interlocutory or final judgment shall have been signed in any of the said courts abolished by the said act, the plaintiff, on filing a certificate thereof as aforesaid, shall be at liberty to proceed thereon in like manner as if such judgment had been signed in this Court, but that in case process of execution shall issue on any final judgment signed in any court abolished by the said act, it shall be stated in such process in what court final judgment was so signed as aforesaid.

Interlocutory or final judgments signed in any court, abolished by 1 W. 4. c. 70.

And it is further ordered, that any proceeding taken in any court abolished by the said act, may be continued by way of suggestion in this Court, such suggestion being subject to correction upon a summons for the purpose by any of the Barons of this Court.

Continuing proceeding in such courts by suggestion.

That in case any process shall have issued out of any Sheriff's may

1830.

be ruled to  
return into  
Exchequer  
process is-  
sued from  
courts abo-  
lished.

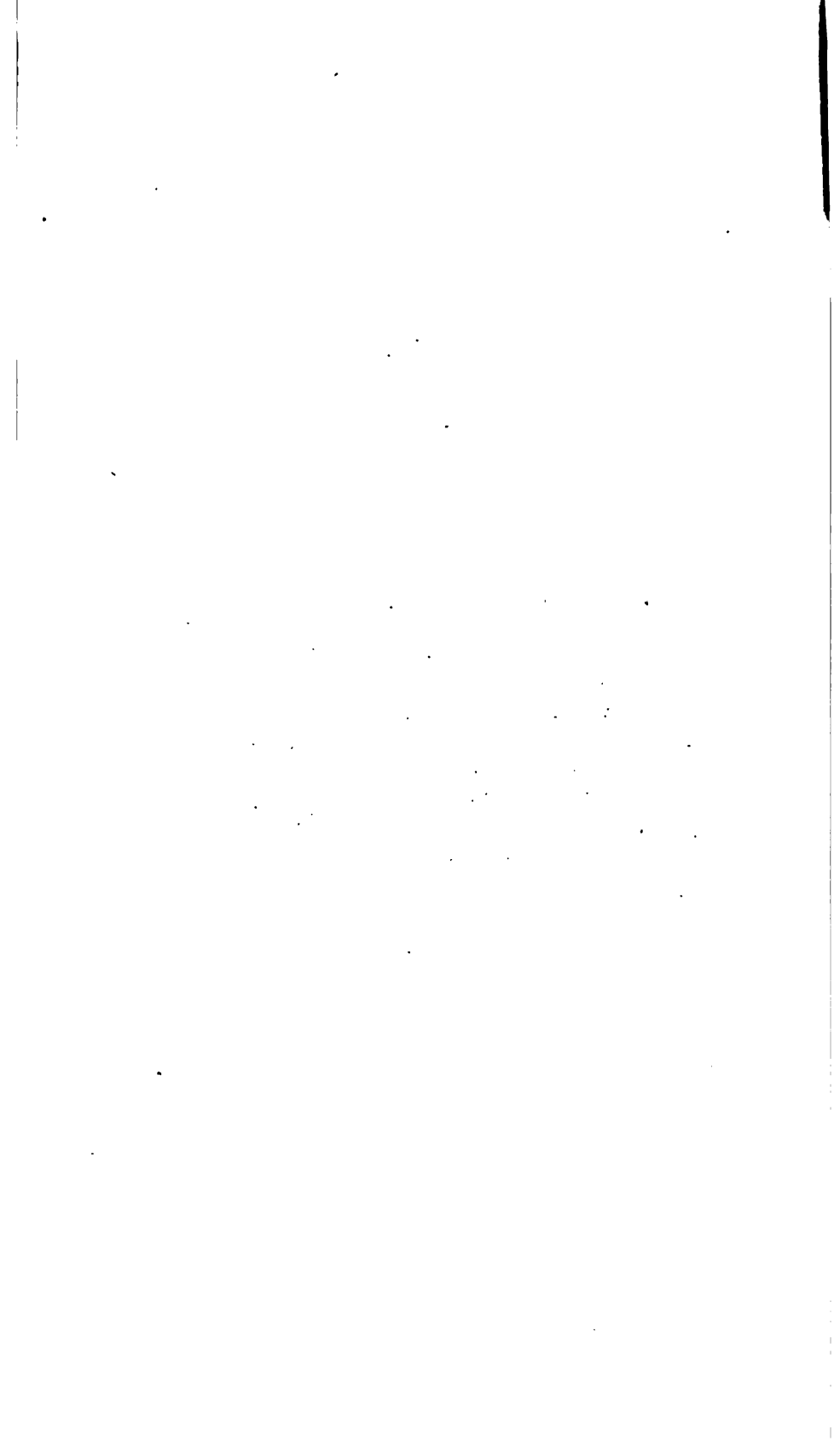
*Cepi corpus.*

of the courts abolished by the said act, the sheriff to whom the same may have been issued, may be ruled to return such process into this Court in like manner as if the said process had been returnable in this Court, and if such sheriff shall have made a return to the said court so abolished as aforesaid, or shall make a return to this court of *cepi corpus*, he may be ruled in like manner to bring in the body, and process so issued as last aforesaid may be returned to this Court by the sheriffs of the county of *Chester*, county of the city of *Chester* and principality of *Wales*, in like manner as if the same had been returnable in this Court.

## MEMORANDUM.

In the Court of Exchequer.

On the 11th *November* 1830, Mr. Justice BAYLEY resigned his office of one of the Justices of the Court of King's Bench, which he had filled since the 9th *May*, 1808. The learned Judge, on this occasion, received the testimony of the respect and regard of the Bar, conveyed to him in a forcible address by Mr. *Brougham*. On the 12th *November* he was appointed a Baron of the Court of Exchequer, and took his seat accordingly.



# REPORTS OF CASES,

ARGUED AND DETERMINED IN

THE COURT OF

EXCHEQUER OF PLEAS,

AND

IN ERROR

FROM THAT COURT,

IN

Hilary Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

---

TRATMAN *against* CARRINGTON, Clerk.

1831.

Jan. 20th.

CASE against the vicar of *Berkeley* for not taking away the tithe of calves duly set out. The first count alleged that the vicar was entitled to have tithes of calves dropped and produced upon a certain farm and lands in the parish, by the cows of the tenants and occupiers of the said farm and lands for the time being, by them kept and depastured thereon—"that is to say, one calf where the number of calves so dropped and produced shall amount to seven and not exceed ten calves, and

Where the order of birth of calves is ascertained, the tenth born is the only one to which the tithe owner is at common law entitled; notice of the birth being given him: where the

order of birth is not ascertained, he is to have one of average quality.

A parochial custom of tithing, by which the tithe owner had one calf out of ten or seven, each calf to be kept by the occupier five weeks if fallen before 3rd May; if after, to be kept one month; is good.



1831.


 TRATMAN

v.

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so progressively one calf in like manner in every subsequent number of calves amounting to seven, and not exceeding ten calves, as the case may be, which may be dropped and produced as aforesaid, over and above the first number of ten calves, which may be so dropped and produced in and upon the said farm and lands, by the cows of the tenants and occupiers for the time being of the said farm and lands, and so by them kept and depastured in and upon the same, in each respective year, each and every such tithe calf, as the case may be, to be kept by the said tenants and occupiers of the said farm and lands, five weeks, if fallen before the third day *May* in each and every respective year; and if fallen after the third day of *May* in each and every such year, to be kept but one month; to wit," &c. It then averred the tenants duty to set apart and keep tithe calves accordingly, and the vicar's duty to take them away at the end of the above respective periods; and that plaintiff in 1829 had thirty calves dropt on the farm. It then proceeded to allege the dates of birth of the tenth, twentieth, and thirtieth calves, and the respective notices of each birth, to the defendant—that each was kept five weeks (being dropt before the third of *May*), and that the vicar had notice to take away the calf at the end of five weeks from the birth of each.—Breach, that defendant did not take the calves away, but suffered them to remain on the plaintiff's farm; by means whereof they encumbered plaintiff's land, mixed with his other cattle, fed on his grass, and put him to expence in the feeding, care, and attendance on them. There were five other counts.—Plea general issue.

At the trial before *Allan Park, J.* at the *Gloucestershire* summer assizes in 1830, the plaintiffs produced from the bishop's registry a terrier dated in 1800, signed by Earl *Berkeley* as patron, the defendant as vicar, and a considerable number of occupiers of land in the parish.

By its title it appeared to be a terrier of all the tithes anciently accustomed to be taken by, and paid to, the vicar of *Berkeley*, "as appeared to us (the parties signing) by an ancient terrier thereof, bearing date 9th *May*, 1682, *now produced to us*, and which said terrier imposeth, that is to say, *inter alia*, For every milch cow ld.; one calf out of ten or seven, each calf to be kept five weeks if fallen before the third day of *May*, if fallen after the third day of *May*, to be kept but one month; for odd calves, either under or above a tithe, for every one that is weaned one halfpenny, and for every one of such sold, one penny out of every shilling, for which each calf is sold is due to the vicar."

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It was proved that the terrier of 1682 had been searched for in numerous places of probable deposit without success. Evidence of reputation was also given to support the mode of tithing calves laid in the declaration. In 1829 the plaintiff had thirty-six calves dropt from cows feeding on land in his occupation, in the parish of *Berkeley*. The tenth, twentieth, and thirtieth were respectively dropped in *March*; each was then set apart and ran with its mother five weeks. Immediate notice of the birth was, in each instance, given to the defendant; and after it had been kept five weeks, he received notice, that the calf had been set out, and to take it away. The defendant not having complied with either notice, the three tithe-calves were kept in the house for the next fortnight on hay, grass and water, and were afterwards turned out with the defendant's other cattle. The other calves were sold before five weeks old, having been fed, during that time, apart from the dams, on skimmed milk, hay and water, except during the first three or four days. It was proved, that the practice of calves running with their dams, was not only injurious to the farmer in the loss of milk which would otherwise be brought to the pail, but in its gradual

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diminution during the period of the calf's suction, from its being not wholly drawn off as at the regular times of milking. The expence of keep and attendance on the three tithe-calves, from the time each attained the age of five weeks, was proved to be 3s. a week each. It also appeared, that in that part of the country, calves dropped at the above periods might be very well weaned from the cow at five weeks old, and that the three calves in question were fine healthy animals.

At the trial it was contended for the defendant, that the proper time for ascertaining the tithe animal was not at the time of birth of the seventh, tenth, &c., but at the time when the whole ten being weaned or ready to be weaned, and to live without the dams, the tithe-calf was by law to be set out. *Welch v. Uppill.* (a) No question of the immemoriality of the practice of tithing in the parish considered *quâ* custom arose on the pleadings; (b) and the learned Judge left it to the jury to say whether it was a reasonable practice. (c) Verdict for plaintiff, damages 17*l.* for the expences of keep, &c.

*Curwood* in last Michaelmas Term obtained a rule to enter a nonsuit.

*Ludlow*, Serjt. shewed cause in that term.—First, The particular *manner* of setting out the tithe of calves in this parish is good, and the difference between it and the common law mode is in favour of the vicar, who is entitled to the last calf exceeding the sixth, where there are only seven, eight, or nine in all. Where there are ten, the tenth is the first tithe payable. Where there are seventeen, eighteen, or nineteen calves, the tenth and seventeenth are the tithe-calves. Where twenty, the tenth

(a) 1 Br. & B. 84.

(b) See *Knight v. Halsey*, in error, 2 B. & P. 188, 9.

(c) See *Bedford v. Sambell*, per Eyre, C. B. Gwill, 1058.

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and twentieth; and on the same principle in larger numbers. In *Lee v. Collins*, (a) a modus in lieu of tithe in kind of calves, to pay one calf out of seven, and a halfpenny for each calf if fewer than seven, was held good. In *Comyns's Digest*, tit. Dismes, (H. 6.) a provincial canon, A. D. 1305, is set forth, prescribing a nearly similar mode of tithing in cases where the number of lambs is under ten; and *Anonymous*, Cro. Car. 403., is there cited as an authority, that the manner of payment by common law is generally conformable to the canon.

The time at which the tithe-owner's right to the tithe of animals accrues, is as soon as they are dropped. The time of setting out and taking away such tithe is not till it is fit to live by natural means without the dam. (b) For the tithe-owner's inchoate right to the particular animal is accompanied by a right to its nutrition till that period, as appears by the Canon *incerti temporis*, cited in *Comyn's Digest*, tit. Dismes, (H. 6.), "*agni, vituli, pulli, equini et alii factus decimales decimentur habitatione ad loca ubi nutriuntur et oriuntur.*" When the tithe animal can live without the dam, the tithe-owner's right is complete, and after notice he must take it away. Taking the rule of common law to follow that of the canon, the occupier must set out an average animal. (c) In *Welch v. Uppill* (c) the question was, whether a lamb yeaned before 25th March was included in a composition ending that day, and the Court held it was; for the rector's right accrued on its being yeaned, though

(a) 1 Roll. Ab. 648.

(b) See the judgment of *Richardson, J.* in *Welch v. Uppill*, 3 Br. & B. 91, 92. and cases collected in 3 Barn's Ecc. L. 498, 499. *notis*, 8th Ed. Gibs. Cod. 678.

(c) *Rebuffas*, Quest. 6. 29., cited, 1 Eagle on Tithes, 370 n.

(d) 1 Br. & B. 84.

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it could not be set out till able to live without the dam. (a)

On the point of view, stat 2 & 3 Ed. 6. c. 13. s. 2. enacts that it shall be lawful for tithe owners to view and see their (prædial) tithes to be justly and truly set forth and severed from the nine parts ; but though *Wilson v. Bishop of Carlisle* (b), and *Christian v. Wren* (c) seem to establish the tithe owners' common law right to the "view and touch" of the nine parts not set out of wool, which is not strictly a prædial, but only a mixed tithe, those decisions do not apply to cases of the young of animals, where the individual thing to be set out is designated in its substantive integrity, to be the seventh, tenth, &c. According to Sir *Thomas Plumer's* dictum in *Bearblock v. Tyler* (d), tithe of calves is a mixed tithe, not prædial arising from the land, but from animals fed on the land. That learned judge proceeds to say, that as to the young of animals, the tithe owner is entitled to the tenth part of the thing itself, for it is of importance to remember that the law does not recognize tithe in money, and it is only from necessity that money is had recourse to, when the number is under ten. If the above and the rest of his holding as reported be law, it would follow that, instead of the whole of every tenth calf, the tithe owner would be entitled to the undivided tenth of every calf, and a farmer having thirty calves dropped at different periods of the year, could not sell any till all thirty were in a state in which the youngest was fit to be weaned. The same hardship would arise from the right here contended for by the vicar to view all the calves together, however different in age, in order to the setting out the tithe calves. Nor could the farmer safely resort to the artificial mode of nourishment by

(a) *Seemle*, on the same food as the dam. See the cases collected by Sir *Thos. Plumer*, in *Bearblock v. Tyler*, 1 Jacob's R. 567.

(b) Hobart, 107. T. 13 Jac.

(c) Banbury, 301.

(d) 1 Jac. 566.

skimmed milk, which affords him the profit of his dairy, but must suffer all his calves to run at large with their dams till the youngest is five weeks old. The right to a view or comparison of the tenth with the other nine parts does not always belong to the tithe owner, even in the case of inanimate tithe. Thus the tithe of milk is to be paid, not by the tenth part of every meal, but by the tenth morning's and the tenth evening's meals of milk entire. (a)

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*Curwood*, in support of the rule.—No case decides that the tenth born calf is ascertained to be the tithe animal at the time of its birth, or that the right to a specific animal arises before the time for setting out, viz. when weaned or severable from the dams. The tithe owner is tenant in common with the occupier of an undivided moiety of each animal till the last mentioned period. The general principle of tithing mere prædial tithe—viz. that the tithe owner is entitled to an opportunity of separating the part set out from the other nine parts, and comparing it with them,—appears, and is not contradicted by any decision as to this mixed tithe of the young of animals. The only difficulty in applying the rule arises from the artificial treatment of the occupier's calves, in order to secure the most milk for the dairy, instead of suckling them by the dams as is usual in the case of lambs.—[*Bayley B.* Do you contend that the occupier is bound to have *all* his young titheable animals, *e. g.* calves, colts, pigs, &c., suckled by their mothers till fit in the course of nature to live without their milk? That is an important question.]—It is sufficient that the occupier is strongly induced to practise fraud on the tenth

(a) See Bunb. 20. and cases collected, Tyrwhitt's note to 3 Burn's Ecc. L. 513.

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animal, if fore-known to be such by its order of birth. A farmer who adopts a more profitable course of management as to the other nine calves, has a strong interest against the life of the tenth, who deprives him of its mother's milk by running with her (a); for should it die, the dam's milk would be saved to the occupier if it belonged to the tithe-owner from its birth. The mere inducement to fraud is held sufficient to overturn a custom of tithing. Thus a custom of tithing hops by the tenth bill or row, (b) and corn by the tenth land, always beginning to count at the first land next the church, (c) were held bad; for as the spots on which the tithe would grow were thus fore-known they *might* be less manured, and the fact whether cultivation was or was not so accommodated, was not considered material. The order of birth of lambs would be very difficult to ascertain, numbers being yeaned in one night, therefore, this tithe is commonly taken in driving them, when weaned, under a yoke or through a wicket. In *Bearblock v. Tyler*, (d) Sir T. Plumer says, that "when the (there mentioned) thirty calves were born, the tithe owner was entitled to *some* three of them, I say *some* three, because till they are set out he cannot have a right to any particular ones, but he has a general inchoate right to three; they are his property, and the farmer is bound to set them out for him. It makes no difference that it is not ascer-

(a) It was not mooted whether the occupier was bound to let the tenth calf run with the dam, taking her whole milk. Q<sup>n</sup>. Whether it would not be sufficient to have fed the tenth calf in any less wasteful manner in which other calves intended for the butcher by the occupier were fed, so as to give the tithe owner a calf fit to be reared or killed at the time of setting it out? But *semble*, it would not suffice to feed the tenth calf as if it was merely intended to be reared.

(b) *Knight v. Halsey*, 2 B. & P. 172.

(c) *Stebbs v. Goodluck*, 1 Leon. 90. Moor. 913. S.C. cited *per cur.* 2 B. & P. 203.

(d) 1 Jacob's Reports, 566.

tained which of them he is to have. The farmer cannot sell them, for if he does, he sells three which belong to the tithe owner." The consequence of that judgment is, that farmers must keep the calves till weaned, and cannot sell them as sucklers (*a*). In this case, the other thirty-three calves were sold before the age at which the tithe could have been set out, so that the tithe owner had no opportunity of comparing them with the tenth, twentieth, and thirtieth.

*Cur. adv. vult.*

BAYLEY B. now delivered the judgment of the Court.—This was an action against the tithe owner, the vicar of *Berkeley*, for not taking away the calves, and the only question was, whether they were duly set out. The plaintiff insisted, that the tenth calf in the order of birth was the tithe calf, and that as each tenth calf was dropped, he gave the defendant notice. The defendant urged, that the plaintiff was to keep all his calves until there was a tenth, that the defendant might have the opportunity of seeing all of them together, and that then the plaintiff was to set out for him one of the ten of an average goodness with the rest; and relied, first upon the practice of tithing hay, corn, and other things, where the whole ten parts must be left till the parson may have the opportunity of seeing whether what is set out for him as the tenth, is really a tenth or not; and, secondly, upon an expression of Sir *Thomas Plumer* in the cause of *Bearblock v. Tyler*.

Where the tithe is to be taken of what constitutes one entire crop, where all the ten parts are produced, cut and prepared at the same time and in the same manner, it is no unreasonable restraint upon the farmer

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to be obliged to leave his hay or corn upon the land till the tithe owner may have the opportunity of seeing the whole, and it is only giving a reasonable security for his being fairly dealt with to require that he should; accordingly, the law does so require. But is there any analogy between the case of hay and corn, and that of calves? Calves may be dropped at different periods of the year, and there may be a very long interval between the earliest and the latest. If, for instance, nine are dropped in March and the tenth at the latter end of the year, is the farmer to be compelled to keep the nine until the tenth is dropped? Would it not be most unreasonable that he should? Again, though the tithe is due the moment the calf is dropped, the farmer is bound to keep it till it will live of itself upon what is the mother's natural food. Is then the farmer to be bound to keep the other nine in the same way? He may wish to sell his nine that they may be suckled by other cows, or he may wish to dry nurse his own. Why should he be restrained? If the law has restrained him he must submit; but when the question is, whether the law has or has not restrained him, the inconvenience which would result from the restraint ought to be considered. We must therefore see whether the law has restrained him or not.

*Gibson*, in his *Codex*, p. 708. says, "the tenth calf is due to the parson of common right." *Burn*, in his *Ecclesiastical Law*, adopts the same rule from *Gibson*, who (p. 708.) lays down the same rule as to colts. In *Brownlow* and *Goldsborough's Reports*, 126. Mich. 9 Jac. 1. "Dower was demanded of the third part of tithes of wool and lambs, and it was asked how the sheriff should deliver seisin, and the Court held, the best way was to deliver the third part of the tenth of wool, and the third tenth lamb, namely, the thirtieth," plainly importing that the Court, at that period of time, considered that,

though you were to have a tenth of that which was in bulk, yet, when you came to animals, the tenth was the animal which the tithe owner was entitled to take. As to lambs, the times of birth are near together, and there is likely to be more difficulty in ascertaining the order of birth. In an anonymous case in Cro. Car. 403., a custom was alleged as to lambs, that if there were seven, eight or nine, the parson should have the seventh, or the eighth, or the ninth, upon certain terms; and if there were ten, the parson should have the tenth; and *Berkeley* and *Jones, Js.* treated the custom as valid, saying the canon law was so. In *Ernst v. Watts* (a) Hil. 9 W. & M. upon a bill to establish different modes and modes of tithing, that as to tithing calves was, "the vicar to have every tenth calf in kind, and where there are but seven, the vicar to have the seventh, making a specific payment," which mode of tithing was confirmed and established. In *Brinklow v. Edmunds* (b) a custom was established, by which (as there alleged), if the parishioner had ten lambs, the tenth was due to the rector on St. Mark's day; and if there were seven, eight or nine, he was to have one, but the authority of that case as to lambs is weakened by what is also stated in the same case, that if there were ten, the parishioner was to choose two, and then the rector was to choose his. *Bell v. Curzon*, Hil. 8 W. 3. says, "Inhabitants having ten calves, to pay one; and if seven, to pay one." Now that does not say the "tenth." So *Gibson*, 708. states a custom as good, where, if there are seven, the parson shall have one.

Now the only reason why I refer to the above customs, because custom, of course, may vary the ordinary rule of law, is to show that payment of a specific

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(a) 1 Wood, 304.

(b) Bunb. 303.

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calf, as the seventh, the eighth, or the ninth, is not unreasonable. *Comyns*, in his Digest, tit. *Dismes*, (H. 6.) sets out a provincial canon in the year 1305 as to lambs, by which, if there were seven, "*septimus detur pro decimâ rectori, qui tres obolos solvat parochiano. Si rector octavum recipit, det denarium; si novum, det obolum aut expectet ad alium annum si maluerit, et tunc habeat secundum aut tertium agnum de agnis secundi anni.*" Now *Comyns* makes this observation upon it: "but this part of waiting to another year is not according to the common law, which requires the annual payment of tithe." Therefore you may consider that though that part is not considered as being according to the common law, yet that it was good as a custom, and that there is nothing unreasonable in requiring such a mode of setting out the tithe. It would seem, therefore, as if *Comyns* approved of the rest of this canon, and considered it as agreeing with the law of *England*. Lastly, Mr. *Eagle* in his *Law of Tithes*, refers to another passage in a book which is called *Rebuffus*, which book is also noted in a reading upon the law of setting out tithes, which is in the possession of my brother *Bolland*; which passage, perhaps, may reconcile or furnish us with the means of reconciling every thing that is to be met with on the subject: "*Decima factus in ordine nascendi cognoscitur, et decimò natus debetur: Si vero non appareat quis sit decimus, tunc mediocris præstetur.*" This, as it seems to us, is a plain and intelligible rule. If the order in which they are born is ascertained, the tenth, and the tenth only, is the parson's calf. If, from the closeness of the times at which the different calves or other animals are dropped, or from other causes it cannot be, or is not ascertained which is the tenth, then the parson shall have neither the best nor the worst calf, but one which may fairly be deemed an average calf. This may, perhaps, reconcile the ex-

pressions of *Sir Thomas Plumer* in *Bearblock v. Tyler* (a), where there were thirty-one calves; there was nothing to show in what order they were born; there was no notice to the tithe owner specifying which was his; all were sold a few days after their birth; and, under these circumstances, *Sir Thomas Plumer* might say, "the vicar was entitled to *some three* of them, but until they were set out he could not have any right to any three in particular." In that case the party sold off the whole thirty-one within a very short period of time; probably they were all calved very nearly together, and I think it most probable that in that case there was nothing to ascertain in what order those different calves were born, which was the tenth, the twentieth, and the thirtieth: and if that was the state of things, the language of *Sir Thomas Plumer* would be most accurate, and still consistent with what may be the general rule as to the parson's right, namely, that you are to have the tenth, or the twentieth, or the thirtieth, when you have ascertained the tenth, twentieth or thirtieth; but in that case there was no evidence upon the subject, that the party was to have, not any three specific calves, but three of those calves which were so born.

Upon the whole, therefore, we are of opinion that where the order of birth is ascertained as it has been here, and the parson is immediately apprised which is his, so as to do away with all supposition of unfairness, the tenth is the only calf to which he is entitled, and, consequently, that the present action against him for not taking the three calves away is maintainable. And let it be remembered, that if what I have mentioned be the rule, and the farmer chooses, as he may, to dry nurse the other nine, the parson then gets one benefit, because he is entitled to the tithe of milk as soon as the

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calves are weaned. (a) The rule, therefore, to enter a nonsuit must be discharged.

Rule discharged.

(a) See 1 Eagle, 369.

EDWARDS *against* JOHN HOSKINS BROWN, STEPHENS,  
*and* HARRIES.

A fraudulent misrepresentation of the legal effect of a deed by which a party is induced to execute, cannot be given in evidence on the plea of *non est factum*. **D**EBT on bond for 3,600*l.*, dated 12th *October*, 1826, executed by the above defendants as a collateral security by them to the plaintiff, in order to complete a mortgage of a farm in *Carmarthenshire*, by the defendant *J. H. Brown* to the plaintiff. The mortgage was by lease and release, dated 12th and 13th *October*, 1826, and with a recovery was intended to pass a fee to the plaintiff, subject to a power of a redemption by the mortgagor. The defendant *J. H. Brown* suffered judgment by default.

A mortgagor, with two sureties, entered into a bond to the mortgagee, the condition of which, after reciting that the mortgagor was seised in tail of premises of which he had covenanted to suffer a recovery to enure to the use of the mortgagor in fee, subject to the proviso for redemption, was, that the bond should be void if the recovery should be suffered, so and in such manner as that, under and by virtue thereof, and of the mortgage deed, the premises should be vested in plaintiff in fee, "according to the true intent and meaning" of the mortgage deed, subject only to the proviso for redemption. The recitals in the mortgage deed stated a seisin in fee by mortgagor's maternal grandfather in 1795. A deed of settlement and fine in 1795 by his daughter and devisee and her husband to themselves for their lives, with power of appointment by the former, which she in 1809 executed by a devise to her son, the mortgagor, for life, and his sons in tail; and also a conveyance after the wife's death of the husband's life estate to the mortgagor, were proved.

In an action on the bond against a surety, Held, first, that these recitals were sufficient evidence that the maternal grandfather of mortgagor had seisin, and that the possession had followed the limitations and power of the deed of 1795. Also that the meaning of the condition was, that such a recovery should be suffered as would vest an absolute estate in fee in the mortgagee.

The defendant *Stephens* after craving oyer of the bond and condition, pleaded, first, *non est factum*; secondly, a plea amounting to a plea of performance of the condition, on which no question arose.

The defendant *Harries* also craved like oyer of the bond and condition, which recited, that *J. H. Brown* was seised to him and the heirs of his body of a certain messuage and premises, &c. therein mentioned, in the county of *Carmarthen*, subject to a term vested in *Harries* by way of mortgage only, to secure 1400*l.* with interest; that the plaintiff had lent to *E. H. Brown* 1800*l.* on the security of the premises, out of which, plaintiff, by direction of *J. H. Brown* had paid *Harries* 1400*l.*, and the remaining 400*l.* to *J. H. Brown*: then as follows; “ And (whereas) by indentures of lease and release, bearing date respectively, the lease on the day next before the day of release, and the release bearing even date with the above written obligation, and made or mentioned to be made between the said *J. H. Brown* and *Margaret* his wife of the first part; *J. Thomas*, attorney at law, of the second part; *J. L. Popkin*, attorney at law, of the third part; the said *John Harries* of the fourth part; *L. Price* and *E.* his wife of the fifth part; (a) the said *Thomas Edwards* of the sixth part; and *D. Price*, attorney at law, of the seventh part; the said *J. H. Brown* and *M.* his wife have, for the considerations aforesaid, accordingly conveyed and assigned the said hereditaments and premises, with their and every of their appurtenances, unto and to the use of the said *J. Thomas* and his assigns, for and during the joint natural lives of himself and the said *J. H. Brown*, to the intent that the said *James Harries* may be tenant of the freehold of the same hereditaments with their appurtenances, until a

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(a) The 1800*l.* advanced to *J. H. Brown* was trust money belonging to Mr. and Mrs. *Price*, who were therefore parties to the mortgage deed.

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good common recovery thereof shall be had, suffered, and perfected in manner therein mentioned ; and it is by the said indenture of release now in recital, agreed and declared between and by all the said parties thereto, that such recovery shall be suffered and perfected at the costs and charges of the said *J. H. Brown*, his heirs, executors, administrators, and assigns, at the great sessions to be holden for the said county of *Car-marthen* ; and that in such recovery, the said *J. L. Popkin* shall be demandant, the said *J. Thomas* tenant, and the said *J. H. Brown* and *Margaret* his wife, vouchees, who are to vouch over to warranty the common vouchee of the said court of great sessions ; and it is thereby further agreed and declared, that from and immediately after suffering and perfecting such common recovery as aforesaid, as well the said indenture of lease, as also the same recovery, and all other common recoveries, fines, conveyances, and assurances whatsoever of the said hereditaments, shall, as to the said hereditaments with the appurtenances, operate and enure to the use of the said *Thomas Edwards*, his heirs and assigns for ever, subject nevertheless to a proviso, condition, or agreement therein contained for redemption of the said premises, on payment by the said *J. H. Brown*, his heirs, executors, or administrators, unto the said *Thomas Edwards*, his executors, administrators, or assigns, of the sum of 1800*l.* with interest for the same after the rate of 5*l.* per cent. per ann. on the days and in the manner herein after-mentioned, (*stating the days* ;) and by the same indenture, the said *John Harries* hath, for the considerations aforesaid, assigned the said hereditaments and premises unto the said *D. Price*, his executors, administrators, and assigns, for the residue of the said term of 99 years, upon trust for the said *Thomas Edwards*, his executors, administrators, and assigns, for the further and better securing to him and them the payment of the said

principal sum of 1800*l.* and interest for the same, and subject to the redemption aforesaid; and whereas, the said sum of 1800*l.* lent by the said *Thomas Edwards* to the said *J. H. Brown*, as herein before is mentioned, was so lent and paid to him by the said *John Harries*, in consideration of the said *J. H. Brown*, *Owen Stevens*, and *John Harries* agreeing for further securing to the said *Thomas Edwards*, his executors, administrators, or assigns, the repayment of the said sum of 1800*l.* and interest as aforesaid, to enter into the above written obligation conditioned as hereinafter mentioned. Now the condition of the above written obligation is such, that if the recovery so covenanted and agreed by and between the parties to the said indenture of release, of even date with the above written obligation, to be suffered of the said messuage, &c. with the appurtenances, shall, at the now next Great Sessions to be held for the said county of *Carmarthen*, be suffered and perfected in all things, in the manner and form mentioned and declared in the said indenture of release, and so and in such manner as that under and by virtue thereof, and of the said recited indentures of lease and release, the said messuage, &c. with the appurtenances, *shall become and be vested in the said Thomas Edwards, his heirs, and assigns for ever, according to the true intent and meaning of the said recited indentures of release*, and subject only to the proviso or condition therein contained for redemption of the said premises, or in default of such recovery being suffered and perfected as aforesaid, then if the said *J. H. Brown*, *Owen Stevens*, and *John Harries*, or any or either of them, or their or any of their heirs, executors, or administrators, do and shall pay or cause to be paid unto the said *Thomas Edwards*, his executors, administrators, or assigns, the said principal sum of 1800*l.* and interest, after the rate, at the times, and in manner herein-before and in the said proviso and covenant con-

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tained for payment thereof in the said indenture of release limited or appointed for payment of the same, and that without any deduction or abatement whatsoever, then the above written obligation shall be void and of none effect, otherwise the same shall be and remain in full force and virtue." Which being read and heard, &c., the said defendant, *John Harries*, says *non est factum*.

Second plea of *Harries*, *actio non*—Because he says, that the said indenture of release in the said condition mentioned, and bearing even date with the said writing obligatory, was made between the said *J. H. Brown* and *M.* his wife of the first part, the said *J. Thomas* of the second part, the said *J. L. Popkin* of the third part, him the said defendant, *J. Harries*, of the fourth part, the said *L. Price* and *Elizabeth* his wife, of the fifth part, the said plaintiff of the sixth part, and the said *D. Price* of the seventh part, which said indenture of release being in the possession of the said plaintiff, the said *J. Harries* cannot produce the same to the Barons of his Majesty's Exchequer here; and that in and by the said indenture of release, it is among other things agreed and declared between and by all the said parties thereto, that it should and might be lawful to and for the said *J. L. Popkin*, or some other person or persons, at the costs and charges of the said *J. H. Brown*, his heirs, executors, or administrators, at any time or times thereafter, to sue forth and prosecute one or more writ or writs of *quod ei deforceat*, in the nature of a writ or writs of entry *sur disseisin en le post*, and to be returnable before his majesty's justices or justices of the great sessions for the said county of C. thereby demanding against the said *James Thomas* the said messuage, lands, tenement, piece or parcel of land and hereditaments, with their appurtenances in the said indenture

of release mentioned by such names, situations, quantities, qualities, and descriptions as should be thought requisite and proper to comprise and ascertain the same, to which said writ or writs the said *J. Thomas* should appear gratis, either in his own proper person, or by his attorney or attorneys thereto lawfully authorized, and should vouch over to warranty the said *J. H. Brown* and *Margaret*, his wife, who should, therefore, appear gratis in their proper persons, or by their attorney or attorneys lawfully authorized, and freely enter into warranty, and should vouch over to warranty the common vouchee of the said court of great session, who should thereupon also appear and enter into warranty, and after imparlance, should make default, so that judgment might be thereupon given for the said *J. L. Popkin*, or other demandant and demandants, to recover the same messuage, &c. against the said *J. Thomas*, and for him to recover in value against the said *J. H. Brown* and *M.* his wife, and for them to recover in value against the said common vouchee, and that execution might thereupon be awarded and sued out and seizin had, taken, and delivered accordingly, and that every other act and thing might be done and executed which might be needful and requisite for suffering and perfecting a good common recovery with double voucher as aforesaid, according to the form and course of common recoveries for assurance of lands in like cases used; and it was also thereby declared by the said parties thereto, that from and after suffering and perfecting such common recovery, and all other common recoveries, fines, conveyances and assurances in the law whatsoever, at any time or times theretofore had, made, acknowledged, levied, suffered or executed, of or concerning the said premises, either alone or jointly, with other hereditaments, by or between the said parties thereto, or any of them, should operate and enure, and

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that the said *J. L. Popkin* and his heirs, and all and every other person and persons who at any time after the suffering and perfecting of the said intended common recovery, should be seised of the same messuage, &c. by virtue of the same recovery, or otherwise, should stand seized thereof to the use of the said *Thomas Edwards*, his heirs and assigns for ever, subject, nevertheless, to the proviso for redemption of the same premises thereafter contained, as by the said indenture of release, relation being thereunto had, will, among other things, more fully appear. And the said defendant *John Harries* further says, that after the making and sealing of the said indenture of release, to wit, on 26th Feb. 1827, also the said *J. L. Popkin* did sue forth and prosecute a certain writ of *quod ei deforceat* in the nature of a writ of entry *sur disseisin en le post*, returnable before his majesty's justices of the great sessions of the said county of C. at the great sessions holden for the same county, next after the making and sealing of the said writing obligatory, thereby demanding against the said *James Thomas* the said messuage, &c. in the said indenture of release described, and in the said condition of the said writing obligatory also mentioned with their appurtenances by such names, situations, quantities, qualities, and descriptions as were requisite and proper to comprise and ascertain the same, to which said last mentioned writ of *quod ei deforceat*, the said *James Thomas* did afterwards, and at the time appointed for the return of the said writ, appear gratis in his own proper person at the then next great sessions holden in and for the said county of C., and did then and there vouch over to warranty the said *J. H. Brown* and *Margaret* his wife, who did, thereupon, at the same great sessions holden for the said county, appear by *J. W.* and *J. W.* their attornies, jointly and severally, lawfully authorized, and did then and there freely enter into

warranty, and vouch over to warranty, the common vouchee of the said court of great sessions, who did thereupon also appear and enter into warranty, and after imparlance made default; and the said defendant *John Harries*, further says, that afterwards, to wit, at the said last mentioned great sessions so holden in and for the said county of C., to wit, in the county aforesaid, judgment was, therefore, given for the said *J. L. Popkin* to recover the same messuage, &c. against the said *J. Thomas*, and for him to recover in value against the said common vouchee, and that execution was thereupon duly awarded by and issued out of the said court of great sessions, and seisin was taken and delivered by and to the said *J. L. Popkin* accordingly and that every other act and thing was done and executed at the said last mentioned court of great sessions holden in and for the said county of C. which was needful and requisite for suffering and perfecting the said common recovery with double voucher as aforesaid, according to the form and course of common recoveries for assurance of lands in like cases used, as by the record and proceedings thereof remaining in the said court of great sessions of the said county of C. at, &c. more fully appears; and the said *John Harries* further says, that *under and by virtue of the said recovery so suffered as aforesaid, and of the said indentures of lease and release mentioned and referred to in the said writing obligatory*, the said messuage, &c. in the said indenture of release, and in the said condition of the said writing obligatory mentioned, became and were vested in the said *Thomas Edwards*, his heirs and assigns for ever, according to the true intent and meaning of the said indenture of release, and subject only to the proviso or condition therein contained for redemption of the said premises. (Verification.)

Third plea, *actio non*. -Because he says, [as in last plea,

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*to profit of recovery inclusive,]* and the said defendant *John Harries* further says, that if the said *J. H. Brown* has been at the time of the making of the said writing obligatory in the said declaration mentioned, seized to him and the heirs of his body of and in the said message, &c. in the said condition of the said writing obligatory and in the said indenture of release described, as in the said condition mentioned, the said last mentioned recovery was suffered so and in such manner as that under and by virtue thereof, and of the said indentures of lease and release in the said condition of the said writing obligatory, and the said message, &c. have become and been vested in the said plaintiff, his heirs and assigns for ever, according to the true intent and meaning of the said indenture of release, and subject only to the proviso or condition therein contained for redemption of the same. (Verification.)

Fourth plea, *actio non*. — Because he says that the said recovery covenanted and agreed by and between the parties to the said indenture of release of even date with the said writing obligatory to be suffered of the said message, &c. in the said condition of the said writing obligatory described, with their and every of their appurtenances, were at the then next great sessions holden for the said county of C. suffered and perfected in all things in the manner and form mentioned and declared in the said indenture of release according to the terms and effect, true intent and meaning of the said condition of the said writing obligatory. (Verification.)

Replications.—*Similiter* to First Plea.

Second, That plaintiff ought not to be barred, &c.— Because he says that, under and by virtue of the said recovery so suffered as aforesaid, and of the said indentures of lease and release mentioned and referred to in the said writing obligatory, the said message, &c. with the appurtenances in the said indenture of release, and

in the said condition of the said writing obligatory mentioned, did not become and were not vested in the said *Thomas Edwards*, his heirs and assigns, for ever, according to the true intent and meaning of the said indenture of release, and subject only to the proviso or condition therein contained for redemption of the said premises, in manner and form as in the said second plea alleged. (Concluding to the country.)

Third, And as to the said plea of the said *John Harries* by him thirdly above pleaded, the said plaintiff says &c.—Because (protesting the insufficiency of the plea in law to bar the action) plaintiff saith that, though true it is that the said recovery of the said message, &c. in the said condition of the said writing obligatory described, with their and every of their appurtenances, was at the then next great sessions holden for the said county of *C.* suffered and perfected in the manner and form as in the said last mentioned plea alleged; yet, for replication in this behalf, said plaintiff saith, that the said recovery was not suffered and perfected so and in such manner as that under and by virtue thereof and of the said recited indentures of lease and release, the said message, &c. did become, and were vested in the said *Thomas Edwards*, his heirs and assigns for ever, according to the true intent and meaning of the said recited indenture of lease, and subject only to the proviso or condition therein contained for the redemption of the said premises. (Verification.)

Fourth replication to last plea: same protestation and admission as in Third.—The said plaintiff saith, that the said recovery was not suffered and perfected so and in such manner as that under and by virtue thereof and of the said recited indentures of lease and release, the said message, &c. with their and every of their appurtenances, did become and were vested in the said *Thomas Edwards*, his heirs and assigns for ever, according to

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the true intent and meaning of the said recited indenture of release and subject only (as in third replication.) (Verification.)

Rejoinders.—*Similiter* to replication to second plea.

Rejoinder to replication to Third plea of defendant *Harries*. — Because, as before, defendant says that if the said *J. H. Brown* had been, at the time of the making the writing obligatory in the said declaration mentioned, seised to him and the heirs of his body of and in the said messuage, &c. in the said condition of the said writing obligatory and in the said indenture of release described as in the said condition mentioned, the said recovery in the said third plea mentioned was suffered and perfected so and in such manner as that under and by virtue thereof, and of the said recited indentures of lease and release, the said messuage, &c. with their and every of their appurtenances did become, and were vested in the said *Thomas Edwards*, his heirs and assigns, for ever, according to the true intent and meaning of the said recited indenture of lease, and subject only to the proviso or condition therein contained for redemption of the said premises. (Concluding to the country.)

Rejoinder to replication of plaintiff to last plea of defendant *Harries*. — Defendant *Harries* says that the said recovery in the said last plea mentioned was suffered and perfected so and in such manner, as that under and by virtue thereof and of the said recited indentures of lease and release, the said messuage, &c. with their and every of their appurtenances did become and were vested in the said *Thomas Edwards*, his heirs and assigns for ever, according to the true intent and meaning of the said recited indenture, &c. as in the last rejoinder. (Concluding to the country.)

At the *Herefordshire* Summer Assizes in 1830, (a) be-

(a) There had been a former trial, at which the question was, whether the condition of the bond had been satisfied by the recovery which had

fore *Allan Park J.* the plaintiff produced the bond sued on—the mortgage deed by lease and release of the same date mentioned in the condition set out on oyer. The parties to the release were the defendant *J. H. Brown* and *M.* his wife of the first part; *J. Thomas*, attorney, of the second part; *J. L. Popkin*, attorney, of the third part; the defendant *John Harries*, (the first incumbrancer,) of the fourth part; *L. Price* and *E.* his wife of the fifth part; *T. Edwards*, the plaintiff, of the sixth part; and *D. Price*, attorney, of the seventh part: After reciting that *John Hoskins* being seised in fee of the premises (mentioned in the condition of the bond), did by his will, dated 23d of *December*, 1794, devise the same to his daughter *Ann*, then wife of *John Brown*, mother of *J. H. Brown*, the defendant, and the heirs of her body; that *John Hoskins* died in 1795, without revoking his will; that *Ann Brown* survived him and died in 1809, leaving *John Brown* her husband, her son, the defendant *J. H. Brown*, and other children, her surviving; that *John Brown* thereupon became tenant for life by the curtesy (a); and after reciting the sale of the life interest of *John Brown*, who had become insolvent, to his

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been suffered, or whether *J. H. Brown*, the defendant, was bound to make an estate in fee to the plaintiff. A verdict was entered for plaintiff on all the issues, except that raised on defendant *Harries's* third plea; but owing to a mistake, no damages were assessed for the plaintiff on the breaches suggested. This Court afterwards held, that, notwithstanding the issue found for the defendant *Harries*, the plaintiff was not estopped by the recital in the condition from disputing the fact that the defendant *J. H. Brown* was seised in tail, or from shewing that he was seised for life only, it being the intention of the parties that the plaintiff should acquire an estate in fee in the premises mortgaged to him. The cause was sent down to the second trial above mentioned by a *venire de novo* on the same pleadings; and damages were assessed as in the text. (3 Y. & J. 423.)

(a) All mention of the settlement and fine of 1795, hereafter set forth, was omitted in the recitals of the release.



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son, the defendant *J. H. Brown*, in *December* 1817, it recited several mortgages of the premises previous to the indenture in recital by the defendant *J. H. Brown* for 1400*l.*; that the same had been paid off by plaintiff *Edwards* at request of *J. H. Brown*, and 400*l.* more had been agreed to be advanced by said plaintiff to said *J. H. Brown* the defendant, on the security of the same premises, on having the repayment of the loan secured by mortgage in fee of the said premises; and that *J. H. Brown* and *M.* his wife, had agreed to suffer and concur in suffering a recovery thereof in order to effect such security. It was witnessed, that in consideration of 1400*l.* paid off by plaintiff to defendant *Harriet*, the former mortgagee, and of the further advance of 400*l.* to defendant *J. H. Brown*, they the said *J. H. Brown* and *M.* his wife, did bargain, sell, alien, release, and confirm to *J. Thomas* in possession, and his heirs, the above-mentioned premises, to hold same to him and his assigns for the joint natural lives of himself and *J. H. Brown* to the like uses, to the intent that *James Thomas* might be a good tenant to the præcipe till the above-mentioned recovery could be suffered. The method of suffering the recovery at the *Carmarthen* great sessions having been set forth, it was agreed, that after it was suffered, the (abstracting) indenture of release and the recovery should enure to the use of plaintiff, his heirs, and assigns for ever, subject to a proviso for redemption.

Plaintiff next proved a deed of settlement, dated 1st of *April*, 1795, by which, and a fine *sur connissance de droit come cco*, (also proved,) the mortgaged premises were limited to *J. Brown* and *Ann* his wife, the father and mother of defendant *J. H. Brown*, for their lives and the life of the survivor, with power of appointment by both, in default whereof to such uses as should be

appointed by Mrs. Brown. The will of Mrs. Brown, dated 19th of June, 1809, executed this power by creating a long term for raising 1000*l.* as portions for younger children, subject to which term, and to her husband John Brown's life estate, she devised the premises in trust for her son, the defendant J. H. Brown for life, remainder to her eldest and other sons in tail, (thus assuming her own estate in the premises to be a fee.) J. Brown was proved to be living, aged 66, in bad health. The actuary of a life-insurance-office proved, that he had taken the annual value of the mortgaged premises to be 80*l.* a year, and 2130*l.* as its value for sale. He valued the life estate of the defendant J. H. Brown, he being aged 38, and a lieutenant in the navy, to be worth 621*l.*, after considering his father J. Brown's life estate, (a) and the younger children's portions. The mortgagee had been some years in possession. The plaintiff had a verdict on all the issues, except that joined on the rejoinder to the replication to the third (or hypothetical) plea of defendant Harries, for 1178*l.*

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Russel Serjt. for the defendant Stephens, had obtained a rule for a new trial, on the ground of rejection of the evidence tendered to prove fraud under the plea of *non est factum*.

E. V. Williams, for defendant Harries, had also obtained a rule to enter judgment for him, *non obstante veredicto*

(a) Russel, Serjt., for defendant Stevens, on moving for a new trial, urged, in reduction of damages, that the value of the life estate of John Brown, the father, which plaintiff had taken under the release, as well as that of J. H. Brown, the defendant, had not been allowed for in the calculation of the value of J. H. Brown's life estate. On shewing cause, it was referred to the Master to ascertain from the actuary whether he had or had not made the allowance contended for.

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against him on the third and fourth pleas, on two grounds : First, that defendant *J. H. Brown* having *prima facie* an estate tail, and being in possession at the date of the release in the lifetime of *J. Brown*, no seisin was proved in *John Hoskins*, the grandfather, before the settlement of 1795, in which *John Brown* and *Ann* his wife assumed disposing power over the fee, nor was any evidence given of possession of the premises in pursuance of that settlement, except the mere recitals in the marriage settlement of 1795 ; Secondly, that the verdict on the first trial having been by consent, the question on the second and fourth pleas could not be discussed, whether by the recovery actually suffered the premises did not rest in the plaintiff "according to the true intent and meaning" of the indenture of release, and this though the Court had on a former occasion held the matter disclosed in the third plea not to operate as an estoppel.

*John Evans* and *Godson* (with them *Campbell*) shewed cause in *Michaelmas* term against the rule obtained by *Russel* for defendant *Stephens* :

First, no evidence was tendered which in any degree connected fraud with the plaintiff, the obligee of the bond. *Stephens* might have been misled to execute the bond as surety by the letter of *James Thomas*, his attorney ; but no privity is shewn between *James Thomas* and the plaintiff *Edwards* ; accordingly the learned Judge rejected the evidence tendered.

Secondly, fraud, had it existed, could not be given in evidence under the plea of *non est factum*. The only authority to the contrary is contained in the Treatise on Pleading, by Mr. Chitty ; (a) but the case cited in sup-

(a) Vol. i. 424. 4th Ed.

port of the position, *Lambert v. Atkins*, (a) only proves coverture to be a good defence on that plea where the deed is void *ab initio*, there being a primary disability to contract at all, and is, therefore, void at the time of pleading, not being, as in this case, merely voidable on proof of fraud. (b) The nearest approach of authority is *Harmer v. Rowe*, (c) where, on *non est factum* pleaded, it was ineffectually attempted to give evidence of the illegality of the consideration at common law, on a supposed distinction between such illegality, and that created by statute. In *Collins v. Blantern*, (d) the bond was held void *ab initio*, on a plea specially averring the illegal consideration of the bond, viz. the compromising a prosecution for felony; and the judgment of the court turned on the demurrer to that plea, and not on the plea of *non est factum*, which was also pleaded. The rule is, that where a deed is void at common law, on account of the illegality of the consideration, such illegality must be specially pleaded (e); and nothing can be proved in avoidance of the deed on *non est factum*, which does not impeach its execution, e.g. on account of the incapacity of the obligor to bind himself. Nothing which only concerns the impression, motive, or consideration which induces a party to execute, can be given in evidence, except on a plea specially alleging the matter from which fraud is to be collected. Lunacy, (f) drunkenness, (g) coverture (h) at the time of

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(a) 2 Camp. 272.

(b) *Pigot's case*, 11 Coke, 27 a.(c) 6 M. & S. 146. 2 Chit. R. 334. S.C. Reported as *Harmer v. Wright*, 2 Stark. R. 35.(d) 2 Wils. 341—349, and see *Paxton v. Popham*, 3 East, 408; both approved by Lord Tenterden, *Greville v. Atkins*, 9 B. & C. 469, 470.(e) See Roscoe on Evid., citing *Calton v. Goodridge*, Bla. R. 1108. *Harmer v. Wright*, (supra) &c.(f) *Yates v. Boen*, Stra. 1104.(g) *Cole v. Robins*, B. N. P. 172 a.(h) *Lambert v. Atkins*, 2 Camp. 272; 12 Mod. 609; 4 H. 4. 30; cited, Gilb. Ev. 160.

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execution, avoid the deed *ab initio*, shewing it never to have had legal existence, and may, therefore, be given in evidence on *non est factum*; but as infancy or daress do not *ipso facto* avoid a deed, but only make it voidable if the obligor shall establish those facts, he cannot avoid it on *non est factum*, (a) but in order to those defences, must confess the deed, and avoid it by a special plea of infancy, &c. concluding, "and so the said deed is void." (b) *Non est factum* means nothing but that the defendant did not seal and deliver the bond. (c)

Next, as to the first ground on which the rule for entering judgment for defendant *Harries* on the second and fourth pleas *non obstante veredicto* on them for the plaintiff, has been rested by Mr. *Williams*. The second and fourth pleas raise the material issues which turn on the legal effect of the recovery admitted to have been suffered; but the third plea, found for defendant *Harries*, is merely hypothetical; viz. that if the defendant *J. H. Brown*, at the time of making the bond, had been seised in tail of the premises, the recovery was so suffered, &c. as to vest them in the plaintiff, his heirs and assigns for ever, according to the true intent and meaning of the said indentures of lease and release: that plea was held bad by this court on the former argument; and as it is no answer to the action, judgment should be entered for plaintiff on the other issues, notwithstanding the verdict for defendant on it. (d) On the second point made for *Harries*, viz. that no seisin is proved in the grandfather *John Hoskins*, or in the father and mother of defendant *Brown*, at the time

(a) *Whelpdale's case*, 5 Co. 119 a. Resolution 2. See Tyrwhitt's Analytical Index to Coke's Reports, tit. *Non est factum*.

(b) See *Collins v. Blanters*, 2 Wils. 349, and *Frazer's note to Whelpdale's case*, 5 Co. 119 b. last Ed.

(c) Per Wilmot, C. J. *Collins v. Blanters*, 2 Wils. 352.

(d) A rule was granted accordingly.

they executed the settlement in 1795: it appears, that *John Brown* the father being seised in fee in that year in right of his wife, settled the premises on himself and wife for their respective lives, with power of appointment by the wife, who accordingly appointed by will, on the mistaken assumption that she had the fee. Then the recitals in the mortgage deed of release of 1826, are evidence that *John Hoskins*, who died in 1796, was father of *Ann*, wife of *John Brown*, and that she died in 1809, whereupon *John Brown* became tenant by the curtesy; (a) at all events the recitals cannot be disputed as far as they shew the parties had an interest; and the plaintiff might then shew the interest not to be what the parties imagined it to be.

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*Russell*, Serjt. for *Stephens*, in support of the rule.— Till the Court decided, in *Michaelmas* term 1829, that the recovery should have had the effect of vesting a fee in the plaintiff, *Stephens* the surety could not complain. He had been defrauded by the letter of the attorney, *Thomas*, stating that the bond now sued on only stipulated for the suffering a recovery, i. e. to vest in the plaintiff such estate as defendant *J. H. Brown* might turn out to have, and would be given up when the recovery was suffered. On the second trial the letter was rejected before proof could be given to connect the writer with the plaintiff *Edwards*, who was present at the meeting of the other parties to the deed at which it was written. It was, however, admissible, on *non est factum*, as shewing that the bond declared on was void *ab initio*, as deriving its existence from fraud, and that the surety was induced to execute by a statement of a

(a) In order to which tenancy by curtesy, *John Brown*, or *Ann* his wife, must have had a seisin in deed by entry during the life of the wife. Co. Litt. 29 a.; unless seisin in deed could not be "attained unto," *ib.*; e. g. if the land were in lease for years during the wife's life. Hargrave's note 163 to Co. Litt. 29 a.

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party to the deed, which was falsified by the event. *Fermor's* case (a) shews that fraud vitiates all transactions, even when applied in furtherance of matters which are favoured in law, as *e.g.* dower and common recoveries. The third resolution in *Whelpdale's* case (b) lays down, that in all cases where a bond was once the party's deed, and afterwards, before action brought, becomes no deed, either by rasure, addition, alteration, or breaking off the seal, there, though it was once a deed, yet defendant may safely plead *non est factum*; for without question, at the time of the plea, which is in the present tense, it was not his deed. That resolution distinguishes the above from the cases of infancy and duress in the second resolution, where the bond is voidable only on special matter shewn. The learned editor of *Coke's Reports*, in a note to *Whelpdale's* case, says, there is much inconsistency in some recent cases as to what may or may not be given in evidence on *non est factum*, suggesting the following rule on the subject:—Whatever tends to shew an invalid or defective execution of a deed at the time of the plea pleaded, may be given in evidence under the plea of *non est factum*; but whatever impeaches the deed by reason of the matter or consideration thereof, whether such matter or consideration renders the deed void by the policy of the common law, or by the express provisions of the statute law, must be specially pleaded. Such plea ought to conclude with—"and so the said deed is void;" and not with "*et sic non est factum*, except in cases where, by craving oyer, or by plaintiff's pleadings, the exception to the deed appears fully on the record, in which case the defendant may demur, or after *non est factum* pleaded, may move

(a) 7 *Coke*, 77 a. *ante*, 16.

(b) 5 Co. 119 b. citing 36 H. 8. and *Dyer*, 59. See *Pigot's* case, 11 Co. 27 a. Com. Dig. Pleader (2 W. 18.), and *Powell v. Duff*, 3 Campb. 181.

in arrest of judgment.”—[*Bayley B.* If the exception to the deed appeared on oyer of the condition, the defendant might demur without pleading *non est factum*, which goes to shew that not to be the correct course of pleading. Thus, in *Colton v. Goodridge (a)*, a bond had been given conditioned in restraint of marriage, but oyer not having been prayed, it was held that the condition could not be given in evidence on *non est factum*.]—Again, it is a defence on *non est factum*, that the bond was delivered as an escrow to a third person to be the deed of the defendant on a future condition, which has not been performed at the time of plea pleaded; for the delivery, which is part of the execution, is impeached as not being absolute. (*b*) The note before mentioned proceeds, “So it may be shown on this plea, that the bond was obtained by fraud,” citing *Comyns’s Digest*, tit. Pleader, (2 W. 18.).—[*Bolland B.* *Comyns* does not bear out that proposition.] The attorney’s mis-statement of the legal effect of the bond and recovery to the unlettered defendant, is like the misreading a deed to a blind man who, on *non est factum*, may prove that fact, for the deed is, indeed, none of his contract (*c*).—[*Bayley B.* If the defendant be unlettered and misled, that would entitle him to relief in equity or at law, if he had pleaded the facts.]—*Thompson v. Rock (d)* shews that if a bail bond be dated and made after the return of the writ, the defendant may avoid it on *non est factum*.—[*Bayley B.* That bond was void, because not taken under the provisions of the statute 23 Hen. 6. c. 9.]

In *Harmer v. Rowe* the *suppressio veri* in not prosecuting one obligor for embezzlement, did not injure the co-obligor, who executed as surety at request of the

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(a) Bla. Rep. 1108.

(b) *Sloytes v. Pearson*, 4 Esp. 255. Com. Dig. Pleader, (2 W. 18.)

(c) Gilb. Ev. 161. 4th Ed.

(d) 4 M. & S. 338.



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guilty person, and knew that he so executed with impunity, the contract being illegal; but here the misrepresentation in *Thomas's* letter induced the surety, contrary to his previous intention, to execute a deed which could be enforced against him at law.

*E. V. Williams* for defendant *Harries*. — First, There was no proof of a seisin in *John Hoskins* to entitle his devisee *Ann*, and her husband *John Brown* to make the settlement of 1795. It appears from the recitals in the release proved by the plaintiff, and executed by him, as well as from those in the condition of the bond, that defendant *J. H. Brown* had an estate tail in the premises, and had also dealt with them as if he had such an estate. The plaintiff then had to prove that the title made to him was totally different from that thus stated in the recitals; but failed to negative sufficiently the existence of the estate tail recited, by merely producing the deed of 1795, which, assuming the authority of the parties to make it, would shew that the defendant *J. H. Brown* had only an estate for life, while no possession by *John* and *Mrs. Brown* under the deed of 1795 was proved. By the settlement of that date, *John Brown* had an estate for life by survivorship, but the estate which ought to have existed in him as husband of *Miss Hoskins*, the devisee in fee, did not follow the course of that limitation. Fraud is not to be presumed in either case; then *Mrs. Brown* may have supposed herself possessed of a larger estate than she had, as well as the defendant *J. H. Brown*.

The remaining point is, Whether by the recovery a fee did not vest in the plaintiff "according to the true intent and meaning" of the indentures of lease and release coupled with the bond? Assuming the truth of the facts in the recitals of the bond and release, there was a right to assume that *J. H. Brown* had an estate tail. It

did so vest, for such a recovery as was contracted for was in fact suffered. The decision in 35 H. 6. 34., cited from 18th *Viner's* Abridgment, 161., on the last argument, that a recital being in the words of the lord only, should not estop the tenant to plead *hors de son fee*, is thus explained and qualified in *Co. Lit.* 352. b. "neither doth a recital conclude, *because* it is no direct affirmation;" and in *Shelley v. Wright* (a) it was held, that the recital of a particular fact in a deed estops the party executing from disputing it; the Chief Justice denying the old authorities, that recitals cannot operate by way of estoppel. Recitals are strong evidence of the meaning of parties, as appears from the class of cases which decide, that the true meaning of an obligation is to be taken from the recitals and condition. In each of the cases of *Arlington v. Merrick* (b), *Wardens of St. Saviour's Southwark v. Bostock* (c), *Liverpool Waterworks Company v. Atkinson* (d), *Hassel v. Long* (e), *Curling v. Chalklen* (f), *Peppin v. Cooper* (g), *Pearsall v. Summersett* (h), all of which arose on security bonds, the general words of the obligatory parts were held to be restrained by the particular recitals in the conditions. In *Payler v. Homersham*, (i) Mr. Justice Bayley says, "There is no doubt a particular recital in a deed will restrain the general words;" a doctrine relied on by Dallas C. J. in *Solly v. Forbes*. (j) In *Parker v. Wise*, (k) Lord Ellenborough assents to the position, that the decisions from *Arlington v. Merrick* to *Hassell v. Long* agree that the condition shall be taken with reference to the recital, and may be explained and restrained by it. To apply

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(a) Willes, 12.

(b) 2 Saund. 403.

(c) 2 New. R. 176.

(d) 6 East, 507.

(e) 2 M. &amp; S. 363.

(f) 3 M. &amp; S. 502.

(g) 2 B. &amp; A. 431.

(h) 4 Taunt. 593. See *Sansom v. Bell*, 2 Campb. 39.

(i) 4 M. &amp; S. 423.

(j) 2 Brod. & B. 50. See *Bac. Ab. Release* (K).

(k) 6 M. &amp; S. 247.

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that principle here, the release to which the plaintiff and defendant *J. H. Brown* are parties, recites the latter to be seised in tail, and is contemporaneous with the bond. The recital of the bond also states the same seisin in tail, and though that is the language of the obligor, yet, as an estoppel, it is in some degree reciprocal, binding both parties, *Co. Lit.* 352. a. *Harries* appears to have been a mere surety, and the condition of a bond being for the benefit of the obligor, shall be construed favourably for his advantage. *Butler v. Wiggs*, (a)

*Cur. adv. vult.*

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BAYLEY B. now delivered the judgment of the Court.—This was an action of debt on a bond, dated 12th of October, 1826, in which the defendant *Brown* suffered judgment by default; and the defendants *Harries* and *Stephens* pleaded separately. The bond as set out on oyer appeared to have been given on a mortgage for 1800*l.* to the plaintiff by the defendant *Brown*, and the condition, after reciting that *Brown* was seised in tail of the mortgaged premises, and that by lease and release of even date, the premises had been conveyed to make a tenant to the precipe that a recovery might be suffered, was—That if a recovery should be suffered in the manner and form mentioned in the indentures of lease and release, and so or in such manner as that under and by virtue thereof, and of the lease and release, the premises should be vested in the plaintiff in fee, according to the true intent and meaning of the release, the bond should be void. [The learned Baron here stated the pleadings and issues.]

At the time of the trial the defendant *Stephens* offered to prove, that he was drawn in by fraud to execute the bond; but the learned Judge being of opinion that fraud

(a) 1 Saund. 66 a.

could not be given in evidence on *non est factum*, that evidence was rejected; and it is upon the ground that such rejection was improper that the rule for a new trial was obtained on the part of *Stephens*. Upon the other issues it appeared by the marriage settlement of *April* 1795 of the father and mother of defendant *Brown*, that he took only a life estate in the mortgaged premises, and it is upon the insufficiency or inadmissibility of that evidence, that Mr. *Williams* obtained his rule to enter a verdict for defendant *Harries* on the second and fourth issues.

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The first question therefore is, whether fraud can be given in evidence on *non est factum*? and I am of opinion it cannot. I agree that whatever shews that the bond never was the defendant's deed, may be given in evidence on the plea of *non est factum*; but if a party actually executes, being competent to execute at the time, and was not deceived as to the actual contents of the bond, though he might be misled as to its legal effect, and though he might have been entitled to avoid the bond by stating on the record that he was so misled, he is not at liberty on the plea of *non est factum* to say that it never became by execution his deed.

The rule as laid down in *Gilbert's Evidence*, 162. is this: that the only point in issue, and the controversy on *non est factum* is, whether the deed declared on be the act of the party; so that when the act is proved to be done, the whole matter denied by the defendant is proved to the jury; but if there be any other circumstances to destroy that act and avoid its binding force, they must be shewn to the Court, that the Court, and not the jury, may judge whether they are sufficient to avoid that deed. We accordingly meet with many instances where that which would avoid a deed and destroy its binding force, both at common-law and by statute, has been held inad-

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missible in evidence on *non est factum*, as well as other instances in which it has been specially pleaded.

In *Whelpdale's* case (a) the third resolution is, "where a bond or other writing is by act of parliament enacted to be void, the party who is bound cannot plead *non est factum*; but in construction of law a deed is to be avoided by the party who is bound by it, by pleading special matter, taking advantage of the act of parliament; for although the act make the bond or other writing void, yet thereto the law does tacitly require orders and manner which obligor ought to follow."

In *Colton v. Goodridge* (b) the defendant was not allowed, on *non est factum*, to refer to the condition of the bond to shew that it was in restraint of marriage, and, therefore, void at common law.

*Harmer v. Rowe* (c) is not distinguishable from this case. There the bond and condition were set out on oyer, and *non est factum* only was pleaded. The defendant was not allowed to prove on that plea, that the bond was given to stifle a prosecution for felony, and was, therefore, void at common law, though the fraud was there clear, and the plaintiff had received notice of the defence to be set up.

In *Thompson v. Harvey*, (d) where the objection to a bond was, that it was in restraint of trade, which is a common law objection, it was pleaded specially; so in *Collins v. Blantern*, (e) where the defence to an action on a bond was, that it was given to suppress a prosecution for perjury; and in both cases, the conclusion of the plea was not *et sic non est factum*, but, "and so the bond was void at law." The two last cases are instances

(a) 5 Co. 119.

(b) Bla. R. 1108.

(c) 6 M. &amp; S. 146. 2 Chit. R. 334. 2 Stark. R. 35. S. C.

(d) 1 Shower, 2.

(e) 2 Wils. 341.

where illegality of consideration at common law was specially pleaded in actions on bonds. But the authorities which come closest to this case, and press most strongly on my mind, are the cases of duress and threats. Every argument which can apply to a case where fraud is the defence, applies equally, where threats or duress are so relied on; a party is equally deprived of his free agency and uncontrolled judgment in either case; and yet in cases of duress or threats, the authorities are uniform, that they cannot be given in evidence upon *non est factum*, but must be pleaded specially. The rule I have mentioned from Gilbert's Evidence, 162, is given as a reason why a man cannot give duress in evidence on *non est factum*. In 1 H. 7. 15 b. *Keble* lays it down: "If a man confess an obligation to be his deed, he shall not conclude *non est factum*, as if he plead infancy. Same law is where he pleads, that he made obligation by duress of imprisonment." So 14 H. 8. 28 a. "if a deed be made by duress of imprisonment, defendant ought to conclude to the action, for it would be a false conclusion to say *et sic non est factum*, for it was his deed." Again, *Plowden*, 66; "if an infant or a man, by duress, makes an obligation, they shall demand judgment *si actio*, because the delivery of the deed was not void." So *Doctrina Placitandi*, 259; "If a feme covert make an obligation, she may plead *non est factum*, for the delivery is void; but otherwise it is in the cases of an infant or of duress, for there it is only voidable, and, therefore, parties cannot plead *non est factum*, but shall demand judgment *si actio*."

The second resolution in *Whelpdale's* case is to the same effect, and upon these authorities my opinion is, that the plea of *non est factum* in this case did not entitle the defendant to give the evidence he offered, and consequently, that such evidence was rightly rejected.

This brings us to Mr. *Williams's* objections, on which,

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as counsel for *Harries*, he seeks to enter a judgment for that defendant on second and fourth issues. This first objection is, that seisin of *John Hoskins*, maternal grandfather of defendant *J. H. Brown*, was not established ; and that such a possession as the settlement of 1795 would have given, was not made out, inasmuch as *John Brown*, father of *J. H. Brown*, would have been entitled to a life estate under the deed of settlement of 1795 ; and the inference is drawn, that there was nothing to shew that *J. H. Brown* was bound by the settlement of *April*, 1795, and his mother's will of 1809, or that *J. H. Brown* had not an estate tail, and that, therefore, these documents were improperly admitted. This was the object of the argument, as I understood it, and the answer to it seems to me to be fully established by the cotemporaneous mortgage deed executed by the defendant *Harries*, on 13th Oct. 1826. That deed is, undoubtedly, evidence against *Harries*, and states, that *John Hoskins* was seised in fee of the premises in question, and devised them, by his will of *Dec.* 1794, to the defendant *J. H. Brown's* mother in tail. That recital, therefore, establishes, as against *Harries*, the seisin of *John Hoskins*, and the fine which was levied in *March* 1795, would convert *Mrs. Brown's* estate tail into a base fee, and would enable her to make the settlement of *April* 1795, under which her will of 1809 would operate. Then as to the life estate to which *John Brown's* father became entitled on his wife's death in 1809 ; the recitals in the same conveyance account for it as against *Harries*, because they show, that in *Dec.* 1817, the life estate of *John Brown* was sold under the insolvent debtors' act, to the defendant *J. H. Brown*. The seisin, therefore, of *John Hoskins*, the grandfather, was established, and the possession of defendant *Brown* shown to be in conformity to the deeds of 1795, as being

derived from and bottoming itself in the life estate of *John Brown*.

The second objection on behalf of *Harries* is, that by the recovery which was suffered a fee did vest in the plaintiff "according to the true intent and meaning of the release." This objection rests wholly on the wording of that expression, and is founded upon this, that according to the true intent and meaning of the release, and the right construction to be put on it, it was sufficient if a recovery was suffered, but that it was not essential that it should give the plaintiff a fee. The first answer is, that it makes the construction of the release parcel of the issue to be tried by the jury, putting it to them to decide, not a question of fact, but a matter of law; and next, that it gives the words in this issue, a meaning they could not have been intended to bear. If, according to the true construction of the issue, they are inserted to qualify it, and to make it mean, not that the recovery vested a fee in the plaintiff *simpliciter*, but that it vested a fee in him, as far as a recovery by *J. H. Brown* could vest one, the objection taken would be valid; but if these words meant no more than to signify that it was the intention of the release, that the plaintiff should have a perfect and effectual fee, the objection fails, and the plaintiff is entitled to have this rule discharged. I have no doubt the latter is the meaning. The defendants all represent by the recital in the condition of the bond, that *J. H. Brown* is seised in tail. The plaintiff takes the estate, not for enjoyment, but as a security for money, not of his own, but trust-money. When, therefore, he takes a covenant for a recovery, which if the recital were true would give him a fee, he does wisely to take a covenant, not merely that a recovery shall be suffered, but that it shall be suffered so as to have the effect of giving him the fee, it being clearly and unequivocally the intent of that security,

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that he should have the fee. The species of contract for title, which a mortgagee is naturally to be expected to take, cannot be one that is qualified according to such title as mortgagor may have, but one that is absolute; and as the condition of this bond shews, that the money secured by the bond was lent to *J. H. Brown* by way of mortgage, this was the species of absolute contract which the defendants were naturally to expect. I am, therefore, of opinion, that both rules in this case ought to be discharged.

Rules discharged.

WINTLE and Another *against* CROWTHER and COOMBS.

When a partnership name is pledged by a bill drawn in the name of the firm, the partnership of whomsoever consisting, and whether the partners are known or secret, or are named in the firm or not, will be bound, unless the title of the party seeking to charge them can be impeached.

**A**SSUMPSIT by indorsees against the drawers of two bills of exchange, the first dated 18th *August*, 1828, for 130*l.* 10*s.* 6*d.*; the other, dated 5th *September*, 1828, for 45*l.* 10*s.* Defendant *Crowther* suffered judgment by default.

At the trial before *Bolland B.* at the Sittings after *Trinity* term, 1830, it appeared that, previous to *October*, 1827, the plaintiffs, as linen-drapers in *Bristol*, had had long dealings with defendant *Crowther*, who was a broker and slop-seller there. Defendant *Coombs* was a coal merchant at *Newport* in *Monmouthshire*. In that month a partnership was formed between the defendants. By the articles *Crowther* was to sell *Coombs's* coals at *Bristol* at a separate place from his (*Crowther's*) house, where he had his slop-selling business in the name of *Crowther* only. *Coombs* was to be a dormant partner in the coal concern, which was to be carried on in the name of "*Crowther and Co.*"; the slop-selling business being still in the name of *Crowther* only. All such bills as should be wanted were to be drawn by *Benjamin Crow-*

ther and Co. The above bills were drawn at three months by the defendant *Crowther*, in the name of *B. Crowther* and Co. on a *Dublin* house, being made payable to the order of the drawers in *London* for value received in coals, and were indorsed to the plaintiffs. At the time of indorsing the first bill to the plaintiffs, the defendant *Crowther* was indebted to them on two overdue bills drawn by the plaintiffs, and accepted by *Crowther* alone for 40*l.* and 30*l.* 8*s.* in payment for goods sold to him in his separate business as a slop seller. *Crowther* then called on the plaintiffs, and said he had a bill for 130*l.* dated 18th *August*, for which he wanted cash. One of the plaintiffs went to his cash-box and gave him something. The bill for 130*l.* 10*s.* 6*d.* was then left with the plaintiffs. Neither bill was ever circulated by them. In *November*, the bill for 130*l.* 10*s.* 6*d.* became due. The plaintiffs applied for payment to *Crowther* only, who then said he should go over to his partner *Coombs* at *Newport*. In *December* the plaintiffs arranged with *Crowther* to pay off the balance due by monthly instalments, and delivering over a number of seamen's tickets which he had obtained in his slop-business. In *January*, 1829, he became insolvent, and the plaintiffs then claimed the amount of the bills from *Coombs*. No bill-book was kept by the plaintiffs. The bills accepted by the defendant *Crowther* in favour of the plaintiffs were found in his possession, but without any appearance of having been paid, and were produced by *Coombs* at the trial.

The learned Baron left it to the jury, whether, under the circumstances, the plaintiffs had exercised sufficient caution in taking the bills sued on, or whether the transaction shewed such gross negligence in the plaintiffs as amounted to fraud and covin?—Verdict for the plaintiffs.

*Ludlow* Serjt. for the defendant *Coombs*, had obtained a rule in *Michaelmas* Term for setting aside the verdict

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as against the evidence, and for a new trial, citing *Lloyd v. Ashby*. (a)

*F. Pollock* and *John Jervis*, shewed cause in that term. —These bills were so drawn as to bind the defendant *Coombs*. The coal trade was carried on in *Bristol* where the plaintiffs live, and the bills purport to be drawn for value received in coals. Therefore, when the plaintiffs took those bills, they might reasonably suppose them to be drawn on account of the partnership, having no notice to the contrary. Notice to *Crowther* of the non-payment of the bills which they had authority to draw, was notice to his partner *Coombs*. Then if the transaction was within the scope of his authority, though in fraud of the partnership, the defendant is liable. They distinguished *Lloyd v. Ashby*, and admitted that the verdict should be reduced by the amount of the two bills for 40*l.* and 38*l.* 8*s.* 6*d.* accepted by *Crowther* alone for his debt to plaintiffs, and handed back to him by them in part discount of the first bill for 130*l.*

*Ludlow Serjt.* and *Talfourd*, in support of the rule, urged that the facts above detailed shewed that the bills sued on were drawn in fraud of the partnership for other than partnership purposes, and that the plaintiffs had been guilty of gross negligence in taking them with a full opportunity of perceiving their indicia of fraud. If they were conusant of the coal-trade carried on by *Crowther* with the defendant *Coombs*, as contended on the other side, they must have known that it did not require the drawing bills except in payment for coals, (a) and in the situation in which they stood with *Crowther*, should have inquired what occasion the coal concern

(a) 2 C. & P. 188. *Abbott, C. J.*

(b) See *Dickinson v. Vulpny*, 10 B. & C. 128.

had for money. *Crowther* at his insolvency possessed the two bills for 40*l.* and 38*l.* 8*s.* 6*d.*, accepted by himself alone in favour of the plaintiffs for slop goods, the last of which had become due on the day the bill for 130*l.* now sued on was discounted by plaintiffs. No receipt appeared on either or any evidence of their payment by *Crowther*. They probably were handed back to him in part of the discount. When a partnership name is put on a bill by one partner, but the party at whose request it is done knows it is not on the account or for the benefit of the partnership, but is the act of the partner only, he cannot sue on that bill. *Arden v. Sharp*, (a) *Wells v. Masterman*, (b) *Shirreff v. Wilkes*, (c) *Ridley v. Taylor*, (d) *Wood v. Holbech*. (e)

Secondly, *Coombs* was only a dormant partner, and had no interest in the transaction. *Lloyd v. Ashby* shews that an indorsee cannot maintain an action against a dormant partner on a bill accepted by one partner in a transaction not relating to the partnership, because the former has no interest on the bill, nor was the bill taken on his credit, as he is not known to be a partner.

*Coombs* was not held out to the world as a partner, nor is there any evidence that the plaintiffs knew that he was a partner of *Crowther* before the observation of *Crowther* to them after the first bill was returned for non payment. The addition of "*and Co.*" to *Crowther's* name as drawer of the two bills now sued on, was not proof in itself that he had any partner. In *De Montfort v. Saunders and others*, lately heard in the King's Bench, that court decided, that the words "*and Co.*" were so frequently used by a firm consisting of one person only, that no inference either way could be drawn from their occurrence; one partner has not a right to bind

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(a) 2 Esp. R. 524.

(b) *Ibid.* 731.

(c) 1 East, 48.

(d) 13 East, 175.

(e) May 20, 1826. Chitty on Bills.

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another without his knowledge, by drawing a bill for his own private debt, and that is a defence in an action by an indorsee. *Green v. Deakin.* (a)

*Cur. adv. vult.*

Jan. 20th.

BAYLEY B. now delivered the judgment of the Court.—This was an action by the indorsees against the defendants as drawers, on two bills of exchange, one dated 18th August, 1828, for 130*l.* 10*s.* 6*d.*, another dated 5th September, 1828, for 45*l.* 10*s.* *Crowther* suffered judgment by default. The defence set up by *Coombs* was, First, that the bills sued on were not, properly, partnership bills; that they were not applied to any partnership purpose; that the creditor passed them away in fraud of the partnership; and that plaintiffs took them under circumstances from which they ought to have inferred such fraud. Secondly, that *Coombs* was a secret partner only; that the plaintiffs knew nothing of him; and that it was not until long after the bills were dishonoured that they made any inquiries about *Coombs*, and that they continued treating with *Crowther* after the bills became due, as if he and he only was the person bound by them. *Lloyd v. Ashby* was cited on this second point, and we have since been referred to *Ex-parte Boletho*; (b) but *Lloyd v. Ashby* having been reconsidered by the court of King's Bench, a new trial was considered proper, and in *Ex-parte Boletho* a joint and a separate trade were carried on in the name of the same individual *Isaac Blackburn*, so that no partnership firm was pledged, and the issues were directed solely to find whether bills drawn and indorsed by him in his own name, payable to his order, which were afterwards indorsed and procured to be discounted by his partner in the joint trade, were drawn on account of the separate or joint business; and whether the bankrupts were

(a) 2 Stark. C.N.P. 347.

(b) 1 Buck's B. Cas. 100.

jointly liable as for monies lent. Passing by these cases, we are of opinion, that where a partnership name is pledged, the partnership of whomsoever it may consist, whether the partners are named in the firm or not, and whether they are known or secret partners, will be bound, unless the conduct or title of the person who seeks to charge them can be impeached.

It is, therefore, on the first point only that we have had doubts; the evidence on which applies chiefly to the first bill. Both bills, indeed, are drawn by *Crowther*, and both indorsed by him; there is nothing on either bill to shew that *Coombs* was privy to its existence. Between *January* and *April*, 1828, *Crowther* contracted a separate debt of 78*l.* 8*s.* 6*d.* with the plaintiffs, and on 10th *May*, 1828, the plaintiffs drew on *Crowther* at two months for 40*l.*, and on 28th *June*, 1828, they drew a second bill on him for 38*l.* 8*s.* 6*d.* The first of these bills became due on the 13th *July*, 1828, and was dishonoured on the 18th *August*, the very day of the date of the first of the bills on which this action is founded. *Crowther* went to the plaintiffs with the bill for 130*l.* 10*s.* 6*d.*, and told *Gilbert*, plaintiff's servant, that he had a bill for which he wanted cash. *Gilbert* shewed him in to one of the plaintiffs, who went to his strong box in which he kept his cash and securities, and from which he gave *Crowther* something, and *Crowther* went away. *Gilbert* then saw that that plaintiff had a bill, but did not know what he had given for it. The bills for 40*l.* and 38*l.* 8*s.* 6*d.* were afterwards in possession of *Crowther*, and were produced by *Coombs* at the trial. They had neither of them any receipt on the back of them; there was nothing to raise a presumption that they had ever been presented for payment. The probability, therefore, was, that they were given up to *Crowther* on the 18th *August*, when he took the bill for 130*l.* 10*s.* 6*d.* to *Wintle*; and had the plaintiffs insisted on retaining the verdict for these two sums, 40*l.* and

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38*l.* 8*s.* 6*d.*, I should have thought there ought to have been a new trial in order to a reconsidering of the whole case; but as the plaintiffs abandon the verdict as to those sums, is there any fair ground on which we can consider the verdict as wrong for the residue? There is no evidence applicable to the bill for 45*l.* 10*s.* nor any thing to impeach the transactions on the bill for 130*l.* 10*s.* 6*d.*, except this, that part of the produce was misapplied to Crowther's private debts of 40*l.* and 38*l.* 8*s.* 6*d.* so that *pro tanto* there may have been a fraud on the partnership; but it does not follow that the fraud went beyond those two sums, nor that because there was a partial fraud on one bill, there was fraud also on the other. Though the jury might draw such an inference, can we say they ought? and we should not be justified in granting a new trial unless we so thought. When a jury did draw that inference on a former trial, this Court rightly thought the case ought to be submitted to another jury. I do not mention any of the cases I have collected on this subject, because in none of them is the present point of partial fraud or partial failure of consideration considered. No case warrants the length to which such an inference would extend. In *Shirreff v. Wilks*, (a) *Hope v. Cust*, (b) and *Green v. Deakin*, (c) the private debt for which the partnership security was pledged, equalled in amount the security given; and the transaction, if bad at all, was bad *in toto*; there was no distinction between one part and another of the amounts of the respective bills; and in *Ridley v. Taylor*, (d) the partnership security was adjudged to be effectually given. I am, therefore, of opinion that the rule must be discharged on the terms of reducing the verdict by striking out 40*l.* and 38*l.* 8*s.* 6*d.*

Rule discharged accordingly.

(a) 1 East, 48.

(b) Cited by *Lawrence*, J. 1 East, 58.

(c) 2 Stark. C. N. P. 347.

(d) 18 East, 175.

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LUMBY *against* ALLDAY.

CASE for words. The first count of the declaration stated, that before the speaking of the words, the plaintiff was, and hitherto has been, and still is, clerk to a certain incorporated company; to wit, the *Birmingham and Staffordshire Gas Light Company*, and as such clerk had always behaved himself with great diligence, industry, and propriety, and thereby had acquired and was acquiring great gains and profits in his said situation as clerk to the said company; nevertheless the defendant well knowing the premises, but intending to bring the plaintiff into public infamy and disgrace with, and among all his neighbours, and the said persons composing the said company, and to cause it to be suspected and believed by his neighbours and subjects, and the persons composing the said company, that the said plaintiff was of a bad character and unfit to hold his situation of clerk to the said company, and an improper person to be employed by the said company, and to cause him to be deprived of and lose his situation, and to vex, &c. him, the said plaintiff, on, &c. at, &c. in a certain discourse which the said defendant then and there had with the said plaintiff of and concerning the said plaintiff, and of and concerning the premises, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last mentioned subjects, falsely and maliciously spoke and published of and concerning the

Where words are spoken of a person in an office of profit which have a natural tendency to occasion the loss of such office, or which impute the want of some necessary qualification for or some misconduct in it, they are actionable. *Secus*, if a clerk to a gas light company is charged with immoral conduct with women, that imputation having no reference to his office, the words not being laid to have been spoken of him in his office as clerk, nor proved to have occasioned him any special damage.

Where the material part of the words declared on is proved to a jury, the verdict must be for the plaintiff; and a nonsuit will not be entered, though on demurrer or motion in arrest of judgment it might be held that an action could not be maintained on the words proved.

A rule will be granted in arrest of judgment after a rule for a nonsuit is discharged.



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said plaintiff, and of and concerning the premises, these false, scandalous, malicious, and defamatory words following: that is to say, "You (meaning the said plaintiff) are a fellow, a disgrace to the town, unfit to hold your (then and there meaning the said plaintiff's) situation (then and there meaning the said situation of clerk to the *Birmingham and Staffordshire Gas Light Company*) for your conduct with whores; I will have you in the *Argus*; you (then and there meaning the said plaintiff) have bought up all the copies of the *Argus*, knowing you (then and there meaning the said plaintiff) were exposed; you may drown yourself, for you (then and there meaning the said plaintiff) are not fit to live, and a disgrace to the situation you (then and there meaning the said plaintiff) hold," (then and there meaning the said situation of clerk to the *Birmingham and Staffordshire Gas Company*.)

The above words were stated with some variations in several other counts.—Plea general issue.—At the trial before *Alexander C. B.*, at the *Warwick Summer Assizes*, in 1830, it appeared, that the plaintiff had, for three years, acted as clerk to the *Birmingham and Staffordshire Gas Light Company*, at a salary of 250*l.* per ann. The most defamatory of the words laid in the first count were proved. The *Argus* was proved to be a publication appearing at *Birmingham* monthly. No proof was given of any written appointment of the plaintiff as clerk. The Chief Baron directed the jury that, if in their opinion the words used would probably tend to injure the plaintiff in his office of clerk, he was intitled to a verdict. The jury found a general verdict for plaintiff. Damages 40*s.*


In *Michaelmas Term*, *Adams Serjt.* moved to enter a nonsuit on two grounds: First, that as the words proved were not spoken of defendant in his office, trade, or calling, and did not import such improper conduct in his

duty as a clerk, as would be likely to occasion his dismissal, they were not actionable, no special damage having been proved. *Levy v. Milne* (a) *Wetherhead v. Armitage*. (b) Secondly, that the declaration stated, that the plaintiff *was* a clerk to the Gas Light Company described, and not that *he was appointed* a clerk; the evidence being, that he acted as such clerk, but no proof being given of any resolution in the books of the directors that he should be appointed.

The Court granted a rule *nisi* for entering a nonsuit on the first point, but on the second point mentioned *Berryman, one &c. v. Wise*, (c) *Rutherford v. Evans*, (d) and it was not afterwards mentioned.

*Goulburn Serjt.* shewed cause in the same term.

The objection on which a nonsuit is moved for arises on the record, and should have been the subject of a motion in arrest of judgment, by which the plaintiff would not be prevented from proceeding to error. The words are said not to be actionable, because not spoken of the plaintiff with reference to his character as a clerk. But the rule laid down in *Onslow v. Horne* (e) is, that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trade, and business, *and which may probably tend to their damage*, or may be of probable ill consequence to them in a trade, profession, or office. (f) This rule is recognized by Mr. *Starkie* in his well-known work on libel (g), where, in distinguishing between words reflecting on a person in an office merely honorary, and an office of profit, he says, "where the office is lucrative, words

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(a) 4 Bing. 195.

(c) 4 T. R. 366.

(e) 3 Wils. 186.

(g) 1st Ed. 115, 116.

(b) 2 Levinz. 233. 3 Salk. 237. 8. C.

(d) 6 Bing. R. 451.

(f) S. C. Bla. R. 753.

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which reflect on the integrity or capacity of the plaintiff render his tenure precarious, and are therefore, *pro tanto* a detriment in a pecuniary point of view."

The salary of the plaintiff's clerkship was proved. The jury were the judges whether the words tended to the loss of office, and have found in the affirmative. It may be said, that the peculiar immorality imputed would not disqualify the plaintiff from acting as a clerk. If so, the imputation in *Woolnoth v. Meadows*, (a) would not be actionable, if considered only as tending to the loss of office. Nor was it necessary to aver the slanderous words to have been used in a colloquium concerning the particular employment of the plaintiff as a clerk, for that necessary application appears from the words themselves (b) which reflect on the conduct of the plaintiff, so as to render precarious his tenure of office, and need not be alleged as spoken of him in that office. In *Stanton v. Smith*, (c) the defendant said of a tradesman, "that he was a sorry pitiful fellow and a rogue, and that he had compounded his debts at 5s. in the pound;" and the plaintiff had judgment, though no colloquium of his trade was alleged, for such words spoken of a tradesman must greatly lessen his credit, and be very prejudicial to him. So in *Reeve v. Holgate* (d), these words, laid to be spoken of plaintiff, being a malster, *habens colloquium* of him and his trade, "Have a care of him, and do not deal with him, he is a cheat and will cheat you; he has cheated all the farmers at E., and is now come to cheat at H.," were held actionable as in themselves, though the alleged colloquium was negatived, for they supply a colloquium, and appeared to be spoken of his trade. To say of a physician "that he is a drunken fool, and ass, and no scholar," is

(a) 5 East, 468.

(b) See Starkie on Libel, 1st Ed. 319, 320.

(c) Lord Raym. 1480.

(d) 2 Levinz, 62.

actionable without averring a colloquium concerning his profession; *Cawdry v. Highly*. (a) This is not a mere imputation of defect of moral virtue, as of insincerity (b), but of immoral acts, having a strong tendency to the result of loss of office.—[*Bayley B. Comyns*, in his *Digest*, tit. Action on the Case for Defamation, (D. 13) to (D. 27.), puts cases of slander of a man in his office, profession, or trade. Is there any such case where the words used do not impute incapacity, or misconduct, or want of some qualification necessary to carry on the office which plaintiff holds?]

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*Adams Serjt.* (with whom was the Attorney General) in support of the rule.—If the words are not actionable the jury cannot find damages, and there should be a nonsuit. As the words merely imputed immorality, they are not actionable in themselves unless a special temporal damage be shewn, or unless they touch the plaintiff in his office. Thus words laid to be spoken of a party in a trade or profession, must reflect on the quality of his wares, his credit, honesty, skill, &c. (c) The rule in *Wilson* only applies where the words are spoken of a person in an office of profit. Suppose the words had been "You are a disgrace to society," that would have equally supported the manner in which the case was left to the jury, who cannot judge what particular words constitute a cause of action or not. In *Seaman v. Bigg*, (d) the words, "He is a cozening knave, and has cheated his master of barley," were held actionable when spoken of a servant in his employ as such. In this case the words used do not prejudice the plaintiff in his office, profession, or employment. The declaration skilfully

(a) Cro. Car. 270; and see *Martyn v. Burlings*, Cro. El. 589.

(b) *Onslow v. Horne*, Bla. R. 754. S. C. 3 Wils. 187.

(c) See Com. Dig. *ubi supra*, and *Alexander v. Angle*, *ante*, 14.

(d) Cro. Car. 480.

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avoids laying the words to be spoken of the plaintiff in his office as a clerk, for a nonsuit must then have followed the failure in proof. The only averment is, that the words were spoken "of and concerning the premises." It is true, that no colloquium of the plaintiff and his office need be averred, if an imputation upon the plaintiff in such office can be collected from the words themselves, but they are not actionable in themselves so as to supply the want of that averment, nor could such averment have made the words used apply to the plaintiff's office. No charge affecting the plaintiff in his office is made: a libel is in itself only proof of what is positively averred or stated therein. *Jones v. Stevens (a)*.—[*Bayley B.* The jury were properly desired by the learned Judge to find, whether the words used had a tendency to produce damage, in order to place that question beyond dispute. The rule is undoubted, that if the facts stated in a declaration are proved, the jury, who are not judges of the law, must find for the plaintiff, who need not be nonsuited. The words, Not guilty, do not involve the question of legal guilt. If this action will not lie, supposing all the facts in the declaration to be proved, the defendant should demur, or move in arrest of judgment. Our duty strictly is to say on this rule, whether the plaintiff should be nonsuited or not, it not having been moved in the alternative in arrest of judgment.]

His Lordship suggested, that the proper course would be to confine the general verdict to whatever count might be considered to be supported by the evidence, in order to avoid the ulterior motion in arrest of judgment, which if the rule for a nonsuit should be discharged, might afterwards be made on the ground of one bad count in the declaration.

No such arrangement having taken place,

(a) 11 Price, 285.

BAYLEY B. now delivered the judgment of the Court. —This case came before the Court on a rule nisi to enter a nonsuit, the ground of which was, that the words proved on the trial were not actionable.

Two points were discussed upon this rule : one, whether the words were actionable or not ; and the other, whether this was properly a ground of nonsuit.

The declaration stated, that the plaintiff was clerk to an incorporated company, called the *Birmingham and Staffordshire Gas Light Company*, and had behaved himself as such clerk with great propriety, and thereby acquired, and was daily acquiring, great gains ; but that the defendant to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words in the first count (which the learned Judge here read.)

The objection to maintaining an action on these words is, that it is only on the ground of the plaintiff's being clerk to the company that they can be actionable ; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk ; that they do not from their tenor import that they were spoken with any such reference ; and that they do not impute to him the want of any qualification which a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by *De Grey C. J.* in *Onslow v. Horne*, (a) that words are actionable when spoken of one in an office of profit which may *probably* occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and businesses, and do or may *probably* tend to their

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damage. The same case occurs in Sir *William Blackstone's Reports*, 753., where the rule is expressed to be, "If words may be of *probable* ill consequence to a person in a trade, or profession, or office."

The objection to the rule as expressed in both reports appears to me to be, that the word "*probably*" or "*probable*" is too indefinite and loose, and that unless it is considered as equivalent with "having a *natural* tendency to," and is confined within the limits I have expressed in stating the defendant's objection, viz. that of shewing the want of some necessary qualification, or some misconduct in the office,—it goes beyond what the authorities warrant. Every authority I have been able to meet with, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business. Immorality only, however gross, is all which is imputed, as here charged. As at present advised, therefore, we are of opinion, that the charge proved in this case is not actionable, because the imputation it contains does not imply a want of any of those qualifications which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk.

The next question is, Is this properly a ground of non-suit? and I am of opinion that under the circumstances of this case it is not. The words proved are nearly all the words the first count contains, and if these words are not actionable, none of the other words contained in that count are.

When the general issue is pleaded to a count, it puts in issue to be tried by a jury, the question, whether the facts stated in that count exist, or not; but the legal effect of those facts, whether they constitute a cause of action or not, is not properly in question.

The proper mode to bring that legal effect under con-

sideration is, before trial to demur, and after trial to move in arrest of judgment.

The duty of the judge under whom the jury try a question of fact, is not to call on them to consider whether the facts *charged* give a ground of action, but to assist them in matters of law which may arise on the trial of those facts; and to give them his opinion whether the evidence makes out the facts so charged, where that is doubtful.

Therefore, as the defendant in this case put in issue the truth of the facts charged against him, viz., the speaking the words laid, and those facts were proved on the trial, I am of opinion, that the rule for a nonsuit ought to be discharged, and that notwithstanding the lapse of time, the party ought to have an opportunity to move to arrest the judgment; for which reason I used the expression "as at present advised:" though we may have a strong opinion on the subject whether the words in the declaration are actionable or not.

Rule for nonsuit discharged, with liberty  
to move to arrest the judgment.

It appears from *Taylor v. Whitehead*, Douglas, 745., that a rule in arrest of judgment will be granted at any time before judgment is entered up, though a rule for a new trial has been discharged. But in *Lane and Another v. Crockett*, 1 Price, 566. the Court of Exchequer held that a party could not move in arrest of judgment after the discharge of such a rule, for it should have been moved in the alternative within the first four days of term; but see the principal case, and Manning's Exch. Pr. 358. *contra*. It would be absurd that the Court should be obliged by any rule of practice to pronounce an erroneous judgment, and thus force the other party to bring a writ of error; see *Dunning's* argument, Douglas, 746. But a motion for a new trial cannot be made after a motion in arrest of judgment, *Philpot v. Page*, 4 B. & C. 160.

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YOUNG and Another, Assignees of IRELAND, a Bankrupt, *against* TIMMINS and Another.

An agreement in partial restraint of trade can only be supported by an adequate consideration.

Thus an agreement by which a brass-founder was to work exclusively for certain factors for his and their lives they not undertaking to find him full employ, but on the contrary reserving liberty to employ others to execute their orders in his trade if they should think fit, and to put an end to the agreement at three months' notice, is bad, though London and six miles round were left open to the party to take orders from.

A note given by the bankrupt for damages arising by his working for others contrary to the above agreement, is void for want of consideration.

**A**SSUMPSIT for goods sold, money lent and paid by the bankrupt *Ireland* to the defendants, and had and received by them to his use, and on an account stated by the bankrupt with the defendants, with a count on an account stated by the assignees with the defendants.

*Pleas.*—General issue.—Secondly, as to first, second, third, fourth, and fifth counts: That *G. Ireland*, before and at the time of his bankruptcy, on, &c., at &c., was indebted to them the said defendants, in the sum of 350*l.* of lawful money, for principal and interest, upon and by virtue of a certain note in writing, commonly called a promissory note, dated at *Birmingham*, the 17th *November*, A. D. 1827, made and drawn by the said *G. Ireland*; and whereby he, the said *G. Ireland*, on demand, promised to pay to the said defendants or order, the sum of 300*l.* for value received. The other subjects of set-off were for money lent, paid, and had and received, and on an account stated.

Replication—*Similiter* to first plea; and taking issue on the other.

At the trial before *Alexander L. C. B.*, at the summer assizes for *Warwick* in 1830, an order of reference directed a verdict to be entered for the plaintiff, damages 1000*l.*, subject to the award of an arbitrator, who was to be at liberty to direct for whom, and for what sum the verdict should be finally entered; and that he should state on the face of the award, the agreement, bond, and note, with the facts relating to them, for the opinion of the Court of *Exchequer*.

At the trial before *Alexander L. C. B.*, at the summer assizes for *Warwick* in 1830, an order of reference directed a verdict to be entered for the plaintiff, damages 1000*l.*, subject to the award of an arbitrator, who was to be at liberty to direct for whom, and for what sum the verdict should be finally entered; and that he should state on the face of the award, the agreement, bond, and note, with the facts relating to them, for the opinion of the Court of *Exchequer*.

The agreement was as follows :

“By memorandum of agreement, made the 28th of January 1826, between *J. W. Timmins* and *Samuel Timmins*, the defendants, described as general factors, of the one part, and *George Ireland*, (the bankrupt,) described as working brass-founder, on the other part; reciting: Whereas the said *J. W. T.* and *S. T.* have for some time past employed and [do now employ the said *G. I.* in executing the orders which they have from time to time received for brass-foundry; and whereas they the said *J. W. T.* and *S. T.* have requested the said *G. I.* to enter into such agreement as is hereinafter mentioned, to work in such his trade or business as aforesaid, and to execute their orders by manufacturing and making goods in the way of his trade for the said *J. W. T.* and *S. T.* alone, to which he the said *G. I.* hath consented in consideration of such his past employment, and also of the undertaking of them the said *J. W. T.* and *S. T.* to continue to employ him the said *G. I.* as heretofore. Now these presents witness, that in pursuance of the said agreement, and for carrying the same into effect, they the said *J. W. T.* and *S. T.* do hereby for themselves severally and respectively agree with the said *G. I.*, that they the said *J. W. T.* and *S. T.* shall and will, during the joint lives of themselves and the said *G. I.*, continue to employ the said *G. I.* in executing their orders in brass-foundry as heretofore, and upon the like or other usual terms, (*subject nevertheless to the provisos and agreements hereinafter mentioned* :) And the said *G. I.* doth hereby agree with the said *J. W. T.* and *S. T.* in manner following, that is to say, that he the said *G. I.* shall and will, during the joint lives of them the said *J. W. T.* and *S. T.*, work for and execute the orders of the said *J. W. T.* and *S. T.* as he has heretofore been accustomed to do in his said trade

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or business as a brass-founder, in a good and workman-like manner, and at general and proper prices or terms: And further, that he shall not nor will at any time work for or execute or cause to be executed the order of any other person or persons whatsoever, in such his said trade or business of a brass-founder as aforesaid, without the consent in writing of the said *J. W. T.* and *S. T.* first obtained for that purpose, and which consent shall be necessary upon every distinct occasion, and shall contain the address of the person or persons for whom he may be thereby permitted to be so employed, and also, the specific work which he is thereby permitted to execute or perform: Provided always, and it is hereby declared and agreed by and between the said parties hereto, that in case the said *J. W. T.* and *S. T.* shall be at any time minded or desirous to put an end to that agreement, and of such their mind or desire shall give or cause to given at least three months' notice in writing to the said *G. I.*, then and in that case, and from and after the expiration of such notice, this agreement shall be considered as at an end and determined, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: Provided also, and it is hereby further agreed, that in case they the said *J. W. T.* and *S. T.* shall at any time have occasion, or be under the necessity by reason of the urgency or extent of orders, or *shall otherwise think fit*, they shall be at liberty to employ any other person or persons to execute orders for them in the trade or business of a brass-founder, anything herein contained to the contrary notwithstanding, and that without thereby releasing the said *G. I.* from his agreement herein contained, of exclusively working for the said *J. W. T.* and *S. T.*; and provided moreover, and it is hereby lastly agreed, that nothing herein contained shall be taken to restrain or prevent the said *G. I.* from taking and executing the orders of any per-

son or persons residing in the city of *London*, or within six miles thereof; but that the said *G. I.* shall be at liberty to solicit and get up the orders of any such person so residing as aforesaid, in the same manner as he would do in case these articles of agreement had not been entered into, anything herein contained to the contrary thereof in anywise notwithstanding."

A bond of the same date, in a penalty of 100*l.* was also executed by *Ireland* to the defendants, conditioned for the performance of the above agreement, which was recited in the bond. The note intended to be set-off was as follows :

" *Birmingham*, Nov. 20, 1827.

" On demand I promise to pay to Messrs. *J. W.* and *S. Timmins* or order, the sum of 300*l.* for value received.

" *George Ireland.*"

£300: 0: 0.

On the 28th of Oct. 1830, the arbitrator made his award, that a verdict be finally entered up for the defendants; and touching the effect of the said agreement upon the mode of dealing between the bankrupt and the defendants, he found that if the bankrupt *George Ireland* had continued to trade with the said defendants on the terms on which these parties originally dealt, without those terms being altered by the said agreement, there would on the account at the close of it, have been due from the said defendants to the bankrupt, the sum of 52*l.* 9*s.* 8*d.*; and he further found, that if the bankrupt and the defendants were to be considered as trading after the execution of the agreement, not on the terms on which they originally dealt, but on the usual terms of the trade, that then there would have been due upon the account at the close of it, from the defendants to the bankrupt, the sum of 11*l.* 10*s.* 7*d.*; and he further found, that the said promissory note was given inde-

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pendently of the account, and in consideration of breaches of the said agreement, committed by the said *George Ireland* before his bankruptcy, in working for several individuals in manner as prohibited by the said agreement, and that several instances of such breaches in working for customers of the defendants in manner as prohibited by the said agreement were proved before him.

*Waddington* having on the 9th day of *Michaelmas* term (a) obtained a rule to set aside the award, and to enter a verdict for the plaintiff for the larger or smaller sum named in the award as the Court should direct, the case was ordered to be set down in the new trial paper.

Jan. 21st. The *Attorney General*, *Goulburn*, and *Hill*, shewed cause.—The bankrupt was capable of making this voluntary agreement in partial restraint of his trade, notwith-

(a) On the 26th *October* the arbitrator's clerk told the plaintiffs that the award would be ready on the 28th. On that day the award was ready. On the 30th the clerk to the plaintiffs' attorney called at the arbitrator's chambers to enquire if the award was ready, and was told that he might have it. On the 3rd *November* the same clerk was told the same thing. On the 13th *November* it was taken up by the plaintiffs. On the 15th (the 14th being a Sunday) the order of reference was made a rule of court, and the rule nisi was obtained for setting aside the award. *Emmott v. Arnold*, 6 B. & C. 629; *Thompson v. Jennings*, 10 Moore, 110; *Borrowdale v. Hitchener*, 3 B. & P. 244. were cited as shewing that the application to set aside the award should have been made within the period allowed for moving for a new trial, had a verdict been taken at the assizes. But the Court intimated that it had a discretion as to the time of moving for relief against the award, (the submission not being made under 9 & 10 W. 3. c. 15, but by rule of court in an action pending; *Rogers v. Dallimore*, 6 Taunt. 111.) therefore, that as it was intended at the trial to take the opinion of the court on the construction of the agreement to be set out by the arbitrator on the award, the argument should proceed on the main points which occurred on that instrument.

standing *Magna Charta*, c. 29., which provides against a forcible and wrongful disseising a freeman of his liberties or free customs. If I sell my liberty to trade, it is no longer mine, but his to whom I sell it (a). The alternative of the sums awarded shews a valuable consideration moving from the defendant to the bankrupt for his promise to work exclusively for them, viz. the higher rate of wages to which he was entitled under the agreement. From his previous employ by the defendants, he could judge whether it was beneficial or not, and whether, by acceding to the agreement, he might expect more permanent employ and an extension of trade. The parties were not rivals, as in most of the reported cases on this subject, but were identified in interest; the defendants, as factors, being to get the orders which the plaintiff was to execute. Nor is it necessary that there should be an express contract to find him full employ if it can be gathered from the whole agreement that he was to have reasonable employ. In *Rex v. Birmingham* (a), a party was hired by a screw-maker for a year "good earn good hire," to work for him and no other master in making screws at so much the gross: his wages were to depend on his labour, and if he earned nothing he was to have nothing. That was construed to be a contract for constant employ, so that a year's service under it conferred a settlement, though the master never contracted to find the pauper full employ. Though the defendants, as factors, cannot ensure constant employ, they and the manufacturer suffer equally from a want of orders during a period of slack trade. The restraint of trade is only partial; for the metropolis is left *bonâ fide* open to the bankrupt, and might probably be a more valuable market than the rest of the kingdom. The

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(a) *Mitchell v. Reynolds*, 10 Mod. 134. S. C. 1 P. W. 188, 189.

(b) *Douglas*, 333.

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consideration to be other than that which the note imports.] The defendants only seek to set off so much on the note as will be equal to the balance due from them to the bankrupt on the account current between them. The note given to them by the bankrupt, he having a claim on them for work at the time, is a payment. *Skyring v. Greenwood*, (a) *Shaw v. Picton* (b). If a doubtful right of what is due from them to him may not be a good consideration for a promise to pay where the parties have agreed to settle their claims relating to it, suits could never be avoided. (c)

Lastly, the bankrupt having dealt unfairly in making for other factors, was under a moral obligation to pay the defendants the damages accruing thereby, so as to give a right of action on his subsequent promise to pay. *Lee v. Muggeridge*. (d)

*Adams Serjt. and Waddington* in support of the rule.— This agreement is void in law. The rule is, that a bond or promise to restrain oneself from trading in a particular place, if made on a reasonable consideration, is good. *Secus*, if it be on no reasonable consideration, or restrains a man from trading at all, *Mitchell v. Reynolds* (e). Now to sustain such an agreement, the restraint must be partial, and the consideration adequate, the agreement must be mutual, and the obligation of the parties co-extensive.

Here the restraint is general, and the exception of *London* particular, if not merely colourable. There is no mutuality, for the defendants are only to employ him when they had work for him, which they do not under-

(a) 4 B. &amp; C. 281.

(b) *Ibid.* 715.(c) See *Longridge v. Dorville*, 5 B. & A. 117. *Tooley v. Windham*, Cro. El. 206. *King v. Hobbs*, Yelverton, 25.

(d) 4 Taunt. 36.

(e) 1 P. Wms. 181. 10 Mod. 85. 130. S. C.

take to find at all times. In *Gale v. Reed* (a) the agreement was held mutual, Lord Ellenborough saying the restraint meant to be enforced on one side, should in reason be co-extensive only with the benefits meant to be enjoyed on the other. That construction is here prevented by the express proviso, that the defendants should be permitted to employ others. Thus the bankrupt might be left unemployed without benefit to the defendants. Wherever such a contract *stat indifferenter*, and for aught that appears may be either good or bad, the law presumes it *primâ facie* to be bad. (b) The consideration is not co-extensive with the obligation. Suppose this man, for want of the defendants' orders, has no employment, they may *bonâ fide*, retain their claim on him for executing their next year's orders; or they may have orders which they do not give him, but execute by other workmen at inferior prices. The true distinction is, not between promises and bonds, but between contracts with and without consideration. (c) In *Homer v. Ashford*, (d) Best C.J. says—"The law will not permit any one to restrain another from doing that which the public welfare and his own interest require him to do. And for partial restraints there must be some consideration, and what amounts to an adequate consideration, is to be decided by courts of justice." In the words of Mr. Baron Vaughan in *Wickens v. Evans*, (e) the only question is, whether there appears on the face of the agreement a sufficient consideration for the partial restraint of trade it contemplates. It is clear that the bankrupt did not get sufficient work, if in eighteen months 300*l.* damages were incurred by working for others, in breach of this agreement. The agreement, there-

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(a) 8 East, 80.

(b) 1 P. Wms. 191. 192.

(c) *Mitchell v. Reynolds*, 1 P. Wms. 181; 2 Saund. 156. note.

(d) 3 Bing. 323. 326.

(e) 3 Y. &amp; J. 330.



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fore, is bad, if the public is deprived of the bankrupt's work while he remained unemployed, though it had even provided for his executing every order the defendants had.

Further, the bankrupt had no remedy on this agreement. The defendants undertake to employ him "in executing their orders;" the breach of which must have been laid by the bankrupt for not employing him in *all* the orders they from time to time received. But the proviso is a distinct answer to such a breach, and under its words "otherwise think fit," the defendants have the option not to employ the bankrupt. The agreement is *nudum pactum*; for supposing the defendants to have orders, they were not bound to send them to be executed by the bankrupt. In *Cheesman v. Nainby* (a) the restraint was of a trivial nature compared with the present, where the whole country except *London* is interdicted. In *Davis v. Mason* the benefit to the party restraining was co-extensive with the restraint, which was confined to the circle within which he might sustain injury, and the rest of *England* was open to the party restrained. The restriction of 150 miles in *Budd v. Guy*, is the most extensive instance yet supported. A bye-law in partial restraint of trade has been held bad, unless resting on custom; *Gun-makers Co. v. Fell*, (b) where the defendant's trade was restricted to a particular company in *London*, and in the country was left open. The total failure of consideration for the agreement operates equally on the note, which is void, *Barber v. Backhouse*. (c)

LORD LYNTHURST C. B.—I am of opinion that this agreement cannot be sustained. Where one party agrees to employ another in the way of his trade, and

(a) *Str.* 739. 2 *Ld. Ray.* 1456. 3 *Brown P. C.* 349. *S. C.*

(b) *Willes*, 384.

(c) *Peake*, 50.

the other undertakes to work exclusively for him, that is a particular restraint of trade which may be supported by proof of adequate consideration. This case, then, entirely depends on the question—Is there an adequate consideration?

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Now the defendants agree to employ the bankrupt as heretofore, but do not stipulate to find him full employment. Suppose the defendants' business to decline, how was the bankrupt to be situated? He could not apply for business elsewhere, except in *London*, where he was probably unknown, and might therefore be wholly out of employ. Another objection to the agreement is, that the defendants were to employ the bankrupt, subject to the provisos and agreements thereafter mentioned, by one of which the defendants were to be at liberty to employ other persons in executing their orders, in the trade of brass founders, not only in case of urgency of orders, but when they should otherwise think fit. This stipulation, coupled with other parts of the agreement, placed the bankrupt at the mercy of the defendants; nor can such an adequate consideration be pronounced to exist as will give validity to such an agreement.

On the question whether the promissory note given by the bankrupt in order to settle the defendants' claims on him for breaches of the agreement, can be set off by them against the action of the assignees for the produce of his labour, I have no doubt. In *Bilbie v. Lumley*, money was actually paid, with a full knowledge of the facts, and in ignorance of the law; but here there is only a promise to pay. If the consideration for the agreement fails, the promissory note must be also invalid.

On the point of the amount to be recovered for the bankrupt's work, the assignees cannot rely on the agreement as far as regards the rate of wages referred to in it, at the same time that they repudiate it for inadequacy of consideration; a verdict must, therefore, be

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entered for the plaintiffs for 11*l.* 10*s.*, that being the estimated value of the bankrupt's work done, if executed on the usual terms of the trade.

BAYLEY B.—Although Lord *Lyndhurst* has, in a great degree, anticipated the judgment which I intended to deliver, the parties to the cause are entitled to be satisfied by knowing the opinion of each judge, and the grounds on which it is founded. The first point is, —That though this agreement operates only in partial restraint of trade, it has not a consideration adequate to support that partial restraint. The bankrupt agrees not to work in his trade for any person not residing in *London*, or within six miles of it, except the defendants, unless by their consent in writing, obtained on every distinct occasion. The restraint of trade here is on the business which the party is carrying on by himself and his labourers. For though called a working brass-founder, he probably employed workmen, having, as it appears, been made a bankrupt. The rest of the agreement may be prejudicial to his own interest, (for every man has a right to the fruits of his own labour) as well as to the interests of the public, who have a right that the extent of his trade should not be restrained.

Next, is the restraint imposed on the bankrupt by the agreement, against working out of *London* and six miles round, or without specific leave from the defendant, founded on a reasonable consideration?

If I could find any obligation on the defendants to find the bankrupt a supply of work sufficient to keep him and his workmen in an adequate and regular course of employ, that might be a good consideration for the restraint he thus imposes on himself; but if no such thing exists, and on the contrary I find it possible that no employ might for a considerable time be given to him, then there is no adequate consideration. It was well put by

Mr. *Waddington*, that we are to consider what the bankrupt could do in an action to enforce a sufficient supply of work from the defendants. What is the nature of the work and of the matter to be done? The defendants are general factors, getting orders which the bankrupt was to execute; and it appears from the agreement, that they had employed him heretofore to execute these orders in his trade of a brass founder. It is obvious that he was to be employed according to the orders he should from time to time receive from the defendants. How then would he be employed in the interval of such orders? He cannot work for the neighbourhood without an especial consent, which might be arbitrarily withheld.

Again, by this agreement the defendants are at liberty to employ other persons to execute orders for them in the trade of a brass founder, in case they "shall at any time have occasion, or be under the necessity by reason of the urgency or extent of orders, or shall otherwise think fit;" but without releasing the bankrupt from his agreement to work exclusively for them. Thus, he may not get all the orders the defendants have to execute, and the means of employment, which under the agreement he might otherwise have, are limited. For instance, an order for work which might have occupied the bankrupt for a month, would, if he merely shared the execution of it with others, employ him a much shorter time. The latter part of the restriction, "if they shall otherwise think fit," does not confine the defendants to the employment of other workmen in cases of necessary urgency and pressure of business. According to these words, if the defendants could procure as good a workman as the bankrupt on cheaper terms, or a cheaper workman, they might withdraw their employ from him entirely. Suppose he remained unemployed by them for six months, could he have sued them for breach of the agreement? Their answer

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would have been, "we had no orders which we thought it fit that you should execute; we thought fit to employ other workmen to do them."

On consideration I am further of opinion, that we ought not to inquire into the extent of the employment afforded by the defendants to the bankrupt before the date of the agreement, for the extent of his employ must under that agreement depend on the number of orders the defendants as general factors should receive. The consideration then for the particular restraint of trade in this case is inadequate.

The next question is, Whether the fact of giving a note by the bankrupts, supersedes the objection to the agreement in question, or forces him, or his assignees, to submit to a set-off of its amount against their claim for the bankrupt's earnings? I agree that every promissory note *primâ facie* imports a consideration; but the giving a promissory note is not equivalent to payment (*a*); and if the maker, when called on for payment, can shew that he is so called on, on a contract contrary to public policy, the signing such a note does not put him in a worse situation than if he had not signed it; and he may resist such payment on proof that it ought not to be made. Then the note cannot be set off on the point of the amount which the assignees are entitled to recover; the arbitrator has found, that if the business had been carried on on the terms on which the parties originally dealt, without those terms being altered by the agreement, 52*l.* 9*s.* 8*d.* would have been due from the defendants to the bankrupt at the close of the account; and further, that if the bankrupt and the defendants were to be considered as trading, after the execution of the agreement, not on the terms on which they ori-

(*n*) See cases collected, *Robinson v. Read*, 9 B. & C. 449, and *Ambert v. Walsh*, 4 Taunt. 293.

ginally dealt, but on the usual terms of the trade, that then a sum of 11*l.* 10*s.* 7*d.* would have been due; but the parties did not continue on the terms originally agreed on, and the Court does not know them, or whether the bankrupt then worked exclusively for the defendants. Perhaps the new agreement was made as the defendants might not choose to give the higher prices, if they could not secure the bankrupt's exclusive services.

But it is clear that under the new agreement the intention was to recede from the old and to accede to new terms, subject to the provisoes above mentioned. If the plaintiffs repudiate the terms of the new agreement, how can they go on on the old terms? The Court cannot tell whether the bankrupt would consent to be employed on the old terms. His work must, therefore, be paid for on the usual terms of trade, and the minor sum of 11*l.* 10*s.* is all that the plaintiffs ought to receive.

VAUGHAN B.—When the facts are ascertained there is no difficulty in applying the law so clearly laid down in *Mitchell v. Reynolds*, and *Chesman v. Nainby*, which are the leading cases on the subject, and cannot be mistaken; any agreement by bond or otherwise, in general restraint of trade, is illegal and void. But such a security given to effect a partial restraint of trade may be good or bad as the consideration is adequate or inadequate. The Court are to decide on that subject, and will see, on the whole, whether the contract is fair between the parties. This agreement must, therefore, be read with that view; and had no proviso been introduced, I should have had no greater difficulty than at present.

The consideration is wholly inadequate for even the partial restraint of trade. The defendants agree to employ the bankrupt subject to certain provisoes. The bankrupt is quite at the mercy of the defendants in

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both : by the first, the defendants may destroy the agreement at three months' notice, whereas the bankrupt is bound for life ; and by the second he is bound to work exclusively for them, while they may at pleasure employ other workmen to execute their orders.

As the agreement cannot be repudiated on one hand and adhered to on the other, the verdict must be entered for the smaller sum.

BOLLAND B.—The right claimed over the workman is, in this case, so large, that a mutuality of contract is particularly requisite. If the work is one of skill, to be only performed by the workman himself, the loss would be confined to that of his own daily labour ; but in this business, an extensive factory is necessary, with a constant supply of workmen to execute orders immediately ; and the defendants, under the agreement, had a right to expect that the bankrupt would always be ready with his men, though they had not been employed for weeks. But there is no stipulation for constant work to be furnished to the bankrupt, or for executing all the orders obtained by the defendants as general factors ; and the words of the second proviso shew that the former had no remedy under the agreement if the defendants kept him and his men unemployed. Again, the bankrupt is to be bound for life to work exclusively for the defendants, who may or may not employ him for their lives ; but if their trade failed, or was left by them, they have a hold on the bankrupt for his life, and he could not retire from business. It is, therefore, clear that this agreement cannot be supported. I also concur with the Court on the second and third points.

Rule absolute to enter verdict for the plaintiffs for 11*l.* 10*s.*

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The ATTORNEY-GENERAL *against* DIMOND.

THIS was an information tried before Mr. Baron *Vaughan* at the Revenue Sittings after *Trinity* Term, 1830, when a verdict was found for the crown subject to the opinion of the Court on the following case :

*P. F. Benfield*, an *English* subject, and resident at *Leicester*, made his will 21st *April*, 1827, appointing the defendant *C. P. Dimond*, also an *English* subject, resident in *England*, and another since deceased, his executors and residuary legatees, in trust to pay the interest of the residue to testator's mother for her life, and after her death to pay the principal to his nephews.—He made two codicils, dated 8th *May*, and 9th *May*, 1828, and died at *Leicester*, 10th *May*, 1828. On 28th *June* the will and codicils were proved in the Prerogative Court of *Canterbury* by defendant. The personal property of testator, (situate in *England* at the time of his death) was sworn to be under the value of 5000*l.*, and a probate duty of 80*l.* only was paid. Testator, at his death, was a creditor to the *French* government in the annual sum of 32,727 francs five per cent. consolidated, inscribed in the great book of the public debt of *France*, called *Rentes*. After his death and on or about 8th *July*, 1828, the defendant as executor, executed a power of attorney (*a*), which,

French stock belonging to an *English* testator may be sold abroad by the *English* executor, and its proceeds administered by him here, without paying probate duty thereon.

## (a) Copy — Power of Attorney.

(5s. stamp.) Pardévant moi, Jean Venn, Notaire Public, à Londres, dûment admis et juré, et en présence des temoins soussignés est comparu Monsieur Charles Palmer Dimond, l'exécuteur testamentaire, agissant de feu Paul Francis Benfield, depuis peu de West Cottage, dans la Paroisse de St. Mary, dans ou pres de Leicester, au Comté de Leicester, et de Vere Street, Oxford Street, presentes, fais, et constitué pour ses mandataires generaux et speciales, Messrs. Mallet Frères et Cie., Ban-



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with a notarial exemplified extract of the probate act, and a notarial certificate of the burial of *P. F. Benfield*, the testator, were produced by Messrs. *Mallet* to the bank of *France*, and the said rentes thereupon sold by them at *Paris* under the said power of attorney, and the produce received by them, and transmitted by bills amounting to 27,183*l.* sterling, on account of the defendant to Messrs. *Hammersleys*, *London*, who placed them to the account of the defendant as such executor, and by his order as such executor, invested the produce of the

quièrs à Paris ; auquel, tant conjointment que séparément, il donne pouvoir de, pour lui, en son nom, et en sa susdite qualité, vendre, ceder, et transférer à  
aux Cours de la place, toutes les rentes, Cinq pour Cent Consolides, inscrites au nom du defunct, sur le grand livre de la Dette Publique de France, est notamment la somme de trente deux milles sept cent vingt sept francs de rente. Faire ce transfert aux clauses cours et conditions qui seront déterminées par les dits mandataires en toucher et recevoir le prix. Et à l'effet de ce qui dessus passer et signer, tous transferts et actes qui besoin, sera signes également tous Acquits Registres et enregistremens remettre tous lettres et pieces de tous reçus, donner quittance et discharges valables, substituer Procureurs, les revoquer, et en établir d'autres ; et généralement tout ce qui sera nécessaire, promettant l'avouer.

Fait et passé à Londres le huit Juillet, l'an Mille huit cent vingt huit,

CHARLES PALMER DIMOND, (L. S.)

Quod Attestor,

Temoins,  
James Platts,  
A. Haygen.

(L. S.) JOHN VENN, Not. Publ.

No. 22. 305.

Nous, Consul General de France en Angleterre, Certifions que la Signature ci-dessus, est veritablement celle de Mr. J. Venn, Notaire Public à Londrès, et que foi doit y être ajoutée.

Londres, le 8 Juillet, 1828.

BARON LEQUIER,

par M. le Consul,

NETTEMENT,

Reçu dix sh.

J. N.

(L. S.) Consul Chancier.

bills in bank three per cent. annuities in the *English* funds in his name, where it still continues.

The question for the opinion of the Court was, Whether the said *C. P. Dimond* was bound to pay a probate duty on the amount of the produce of the said *French* rentes over and beyond the sum of 80*l.*, the probate duty paid on the estate of the said testator, as being at the value of 4000*l.*, and under the value of 5000*l.*? If the Court should be of that opinion, a verdict was to be entered for the crown for 370*l.*; (a) if of a contrary opinion, a verdict is to be entered for the defendant. Either party to be at liberty to refer in the argument to the probate of the said testator's will and codicils, or any other document mentioned in the case.

The legacies, pecuniary and specific, exceeded in amount the 5000*l.* on which probate duty was paid.

*Follett* for the Crown.—The question here is, whether personal property, which, at the time of the testator's death, was abroad, but, after his death, was brought into this country, and administered here as part of testator's personal assets, is liable to probate duty or not. This is not a case where the property was not brought here to be administered, (b) or where the probate was granted abroad, (c) or limited administration was necessary (d); for a prerogative probate was obtained, under which administration took place. Probate duty is payable on all the estate and effects of the testator, of which the executor obtains, or has a right to obtain possession, as being "the estate and effects for, or in respect of which, probate, letters of administration or con-

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(a) The difference of duty.

(b) *Haye v. Fairlie*, 1 Russ. 117.

(c) *Tourton v. Flower*, 3 Peere Williams, 369. *Currie v. Bircham*, 1 D. & R. 35.

(d) See *infra*, 247, *arguendo*.

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"*firmation* respectively shall be granted or expeded." (a) L. C. B. *Alexander*, in *Ewing's* case, (b) mentions these words as "evidently confining the charge on the probate to those particular estates to be recovered of right by force of that administration." In this case the executor having taken possession and administered under the probate, the *French* rentes were part of the "estate and effects," in respect of which the probate was granted. Personal property having no locality, its distribution is regulated not by the *locus rei sitæ*, but by the domicile of the owner at the time of his death. Thus the English law of succession is recognized abroad *quoad English* property in foreign funds. But though our law recognizes the *situs* of personal property at the time of the death, as far as respects the spiritual court which is to grant the probate or letters of administration, (c) that originated in the local right which each ordinary formerly had to take possession of such goods of intestates as lay within his jurisdiction. Thus, if there were goods in different dioceses, each ordinary would take possession of them only in his own diocese. The same rules were adhered to when ordinaries began to make grants of probate, or letters of administration to next of kin administering the personalty. Such grants vest in the executor or administrator all the property of the deceased within the jurisdiction of the grantor at the time of the grant, or afterwards coming within it. Suppose a party died in *London*, leaving *bona notabilia* there, and that his will was proved there, his personalty would pass by the probate to his executor. If after such probate, and after the acts for granting probate duty, a ship arrived with merchandize of the deceased, it would belong to the executor;

(a) See 55 G. 3. c. 184. Sched. Part III.

b) *Ante*, p. 104.

(c) See 1 Saund. R. 275. note (a), last Ed.

who might sue for and get possession of it, but could not as such support trover, unless the original probate was produced (a) and impressed with an additional stamp duty, sufficient to cover the increased value. (b) Here he could not administer without the probate; then has he not obtained possession and administered these rentes under it?—[Lord Lyndhurst. If a debtor to a testator reside in the province of *York*, at the death of the testator a probate must be taken out in that province; and if there are also effects in the province of *Canterbury*, another probate is necessary there. (c) If the debtor removes from *York* into *Canterbury* after the testator's death, will the *Canterbury* probate maintain an action there for the debt?—]The criterion would then be, whether the executor got possession of the debt under the *Canterbury* probate and administered them there under it. In practice an administration limited to that debt would be granted in *Canterbury*.—[Bayley B. In *Daniel v. Luker*, (d) a party died in *England* intestate, leaving among divers chattels which he had, as well in *Ireland* as *England*, a bond made in *Ireland*. The son obtained a *Dublin* administration and released the bond to the defendant. Afterwards, the widow having obtained *English* administration, got possession of the bond, and sued on it in *England*. The release was pleaded in bar, and the truth was said to be that the bond was made in *London*, and had always remained there, and also that the obligee died in *England*. (e)

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(a) *Hunt v. Stevens*, 3 Taunt. 113.

(b) 55 G. 3. c. 184. s. 41. and see s. 43, 44.

(c) *Shaw v. Stoughton*, 2 Levinz, 86. S. C. Freem. 102. and see Cro. El. 472.; but *semb.* neither need be a prerogative probate, unless *bona notabilia* exist in more than one diocese of the province, or in the diocese of the archbishop therein. See *Burston v. Ridley*, 1 Salk. 39, 40. Rolle's Abr. 908. Toller on Executors, 53. 71. 3rd Ed.

(d) Dyer, 305 a. Mich. 13 & 14 Eliz. Dalison's Rep. 76. S. C. and see *Byron v. Byron*, Cro. El. 472.

(e) The latter fact seems immaterial in case of a bond, which is *bonum no-*

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The Court were therefore of opinion, that the defendant ought to answer to the action, notwithstanding the obligation and release in *Ireland*, and issue was taken, Whether the obligation was and remained in *London* at the time of the death or in *Ireland*? But judgment for the plaintiff seems not to have taken place owing to a mispleading of the issue.]—That case, as well as that put by Lord *Lyndhurst*, turns on the rights of the Archbishops of *Dublin* and *York* to grant administration so as to enable the personal representative to obtain possession of the property in those provinces respectively, and on the conflicting jurisdictions of the spiritual courts in different parts of the *same* dominions. (a) Here there is no such conflict; the executor under a *Canterbury* probate executes a power of attorney here, empowering the bank of *France* to sell out the testator's *French* stock, which was done on the production of the *English* probate.—[*Bayley* B. As the power of attorney with the clause in the will appointing the defendant an executor, and the certificate of the testator's burial were produced, as well as the probate, we cannot say on which document the bank of *France* acted. Though the will names another executor besides the defendant, yet as the latter might act alone in signing the power of attorney, there is no decisive proof that that body did not proceed under the clause in the will. Nor has their act any judicial weight.]—It was for the defendants to shew that they acted under any

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*tabile* where it is at the time of the death, and not where the debtor or creditor are. See cases collected, 11 Vin. Ab. 79. Toller, 55. 3rd Edit. and Cro. El. 472.

(a) Each of the Archbishops of *Canterbury*, *York*, and *Dublin* have a superior jurisdiction. "But if a man has a good in one of these provinces in *England*, and more goods in *France* or in the *East Indies*, then one administration shall serve the turn, because there is no jurisdiction that we take notice of." Per *Hale*, C. J., *Shaw v. Storton*, Freem. R. 102. Where probate duty has been paid in *Scotland*, it is not in practice required again in *England*. And see 39 & 40 Geo. 3. c. 72. s. 16. 41 Geo. 3. (U.K.) c. 86. s. 3.

*French* probate; an executor's authority to sue for assets is invariably derived from the court which grants the probate, and not from the will.—[*Bayley* B.—Can a probate give any power out of the diocese?] (a) Here the executor has the produce of the rentes in *England* as part of the assets, and acts on the probate here. Had any one but his agent obtained possession of the money here, the defendant must have sued for it as executor. So, had he been sued and pleaded *plene administravit*, he would have been charged in respect of the money he had obtained as executor. At common law the ordinary would be equally entitled to take possession of assets which came within his jurisdiction at any time after the death. Since 31 Ed. 3. c. 11. the executor or administrator substituted for the ordinary stands in his place, taking the same rights under the probate or administration, which were vested in the ordinary before that act, and 13 Ed. 1. West. Sec. c. 19. Then the revenue acts subsequently passed affect all the estate which would have vested in the ordinary at common law, including as well those which arrive in his jurisdiction after the grant of probate as before, for at common law the ordinary was equally entitled to both. As the executor would be chargeable with the produce of these rentes in any suit, it is part of the "estate and effects" for the purpose of probate duty.—[Lord *Lyndhurst* C. B. Had the testator died possessed of no property but *French* rentes, which were afterwards brought hither, the executor must have taken out probate in order to protect himself. (b)] No probate having been taken out as to these rentes, the executor is not regularly before the court. Thus in *Logan v. Fairlie* (c) the intestate died in *India*, and administration


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(a) See *Shaw v. Storton*, ante, 248. note a; and 2 Bla. C. 509. post, 251.

(b) Viz. from the charge of *devastavit*, see Toller, 3d Ed. 426.

(c) 2 Sim. & Stu. 284.

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was granted there, but the property had arrived here without specific appropriation to the legatees. The Master of the Rolls held, not only that it was liable to pay legacy duty, but that administration here was necessary, and that the suit had proceeded irregularly for want of a personal representative here. As there is no other standard by which to estimate the probate duty, except the amount of property coming to this country, the criterion is, does it come here as assets to be administered by the executor who receives and administers it here as such? For what he receives as executor, he receives under the probate, that being for this purpose a convertible term with the will.

*Merewether*, Serjt. for the defendant.—This property is not liable to probate duty. The question is not whether this property would be assets in the hands of the executor, but whether any statute imposes on it a liability to duty. Statute 55 G. 3. c. 184. enacts, by s. 38. that no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, that the estate and effects of the deceased for or in respect of which probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially (a), are under a certain value, in order that the duty may be paid. The words of the schedule, part III. before quoted, denote that the matters in respect of which the duty is to be paid, are not the assets to be admi-

(a) See 48 G. 3. c. 149. s. 35.

nistered, but the property in respect of which the administration is granted. Then what is that property here? The *locus rei sita* is conceded to be immaterial as to succession to personalty; but its local position at the death of the owner decides what Court is entitled to grant probate; and as a consequence fixes or takes off the liability to probate duty.

The result of the authorities is thus stated by *Blackstone*, in his Commentaries (a):—"If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones; but if the deceased has *bona notabilia*, or chattels to the value of 100*l.* in two distinct dioceses or jurisdictions, then the will must be proved or administration must be taken out before the metropolitan of the province by way of a special prerogative, which prerogative, properly understood, is grounded on this reasonable foundation, that as the bishops were themselves originally the administrators to all the intestates in their own dioceses, and as the present administrators are, in effect, no more than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which these episcopal authorities extend not." The legislature distinguished between the duty on probates which is imposed on the "estate and effects for or in respect of which the probate or letters of administration are granted," and that on legacies which refers to the distribution and payment of the legacy; being made payable, "for every legacy specific or pecuniary, charged on personal or moveable estate, and which shall be paid, delivered, retained, satisfied or discharged." Thus in *re Ewing*, this court held, that the legatee should pay legacy duty, because the act by which the legacy

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was discharged was done in this country. (a) Then may that locality shift after the death, or must it exist at the grant of the probate? The language of the probate favours the latter construction; being, "that the deceased having while living, and at the time of his death, goods in divers jurisdictions, by reason whereof the proving and registering the will, and the granting administration of all and singular the said goods, and also the auditing, allowing and finally discharging the account thereof, are well known to appertain wholly to the archbishop, and not to any inferior judge."—[*Bayley* B. The probate goes on in these general terms: "and that administration of all and singular the goods, chattels and credits of the deceased, and any way concerning his will, was granted to C. D. and E. F. the executors named in the said will, they having been sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits." ]—There is no enactment to shew that the administration is to be added to where property is brought within the jurisdiction subsequently to the grant. The 41 G. 3. U. K. c. 86. s. 3., and 55 G. 3. c. 84., ss. 41, 42., only apply in cases where by inadvertence property of a testator is not known to belong to him at the time, so as to enable the executor to include it in the oath; in which case the latter is not to be liable to the penalty in 55 G. 3. c. 184. ss. 37 & 43. for not obtaining the full stamp in the first instance; but the stamp is to be altered. The duty is applicable only to the property to which the administration applied, viz. to the property situated in the jurisdiction. The general words of description at the end of the probate would be controlled by former specific words; now distinct estimates, as

(a) *Ante*, 104, 105, 106. and see 101.

well as probates, are necessary for property situate in the two provinces, with a distinct probate duty payable in each, and in each the oath as to value is confined to the property situate within the province. This is grounded on the jealousy of jurisdiction to be traced in the ninety-second Canon of 1603, (a) which provides against the taking out a diocesan probate where a prerogative probate is required, and shows that the power and jurisdiction of the Ecclesiastical Court is limited by the *situs* of the property at the time of the death being within or not within the diocese or province. It appears from the ninety-third Canon, "That no judge of the archbishop's prerogative shall henceforward cite or cause to be cited *ex officio* any person whatsoever, to any of the aforesaid intents, unless he have knowledge that the party deceased was, at the time of his death, possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died."

The *French* rentes were not obtained under the probate, but by the will. Had the bank of *France* relied on the probate, they would not have required proof of the fact of the death; because the party's death, his having made a will, and appointed an executor, are proved before probate granted. As the will could not be removed, a notarial exemplified extract of a clause in it, with a similarly authenticated copy of the probate act, were all the executor could produce. Thus where there are two probates to be obtained in two provinces, a cer-

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(a) 4 Burn. Ecc. L. 234., providing, "That all chancellors, commissaries, or officials, or any other exercising ecclesiastical jurisdiction whatsoever, shall at the first charge with an oath all persons called or voluntarily appearing before them for the probate of any will or the administration of any goods, whether they know or do firmly believe that the party deceased had at the time of his death any goods or good debts in any other diocese or dioceses or peculiar jurisdiction with that province than in that wherein the said party died, amounting to the value of five pounds.

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tificate of the deposit of the will would be obtained and used in the other jurisdiction. (a) The probate act was used to authenticate the will, and not as even *prima facie* evidence of the death. The certificate of the burial was required at the bank of *France* to prove the executor to be the party actually representing the creditor. The fair inference from the facts stated is, that the property was received under the will.—[*Bayley*, B. Suppose separate probates taken out for effects in *York* and in *Canterbury*, but the *York* effects are afterwards transmitted to *Canterbury* and distributed there, is a fresh probate necessary, or an increase of probate duty?]—That is provided against by 39 & 40 G. 3. c. 72. s. 16., and 41 G. 3. U. K. c. 86. s. 3.; (b) but had the debt been so transferred before the probate granted, a *Canterbury* probate would be required.

In *Tourton v. Flower*, (c) Lord Chancellor *Talbot* said, though the letters of administration had been obtained in *France*, the Court of Chancery could take no notice of what was done in a spiritual court beyond sea on that subject; so it cannot be assumed that in *France* they would take notice of the *English* probate. *Jamney v. Sealey* (d) decides, that where there was no personal estate in this country, the party dying and his will being proved in *Naples*, it was unnecessary to prove the will here. He then referred to the judgments of *Alexander* L. C. B. and *Bayley* B. in *Ewing's* case, where the manner in which probate and legacy duty attach is distinguished. In this case the legacy duty has been paid in pursuance of the cases of *Attorney General v.*

(a) See, as to will of party resident in *Scotland*, *Ireland*, *East* or *West Indies*, leaving effects there and in *England*, Toller on Executors, 71.

(b) See Tyrwhitt & Tyndale's Digest of the Statutes, tit. Stamps, pl. 801, 802.

(c) P. Wms. 371; and see *ante*, p. 248. n. (a.)

(d) 1 Vernon, 397.

Sir C. Cockerill (a) and *Same v. Beaton*. (b)—[Lord Lyndhurst C. B. Suppose a debtor who resided in *America* at the testator's death comes hither after that event, and after the establishment of the will abroad, by means tantamount to probate, the remedy for the debt would be by suit here, he being here. Could you rely on the foreign probate as sufficiently clothing you with the character of an executor to enable you to sue here. (c)]—[Bayley B. Suppose on a will which did not name any executor, administration with the will annexed is granted in *England* to A, and a foreign court makes a like grant to B., could A. sue a foreign debtor coming into this kingdom?]  
The party may have received the proceeds of the rents as residuary legatee.

*Follett* in reply.—The party claims and receives as executor, not as residuary legatee, in which case debts might be shewn to have been paid. On the main question it was necessary to administer the *French* rentes here as assets to satisfy the specific legacies. Whereas

(a) 1 Price, 165.

(b) 7 Price, 560.

(c) *Semble*, not. *Tourton v. Flower*, 3 P. Wms. 370. *Shaw v. Storton*, 1 Freem. 102. *Logan v. Fairlie*, 2 Sim. & Stu. 284. In *Currie v. Bircham*, 1 D. & R. 35. the widow of an intestate in *India* obtained administration of her husband's effects there, and remitted the proceeds in government bills to her agent in *England*. On her return to *England* the agent paid over to her in cash the amount of the bills, retaining 170*l.* for a debt due to him from the intestate. Another creditor afterwards took out administration here, and sued the agent for money had and received to his use as such administrator: Held, that the intestate's wife was entitled to all the effects of which her husband died possessed in *India* by virtue of the *India* administration, and that though she might sue the agent for any claim to the money in his hands (*semble*, not without an *English* administration), the creditor who had thus become administrator in *England* could not. In that case, administration having been granted to the widow, who had the prior right (Toller, 86.), no other had title to a similar grant during her life, and she might perhaps have been sued as such for the debts of the intestate. See *Tourton v. Flower*.

Stock has no locality except for the purposes of probate and administration. *Res v. Capper*, 5 Price, 217. 266.

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in *re Ewing*, on the dicta on which case the defendant relies, the stock was transferred abroad, under the power of attorney signed by the executor here, and remained abroad. As any property which came within the jurisdiction of the ordinary after the death would have vested in him at common law, the personal representative is now entitled to it under the probate, the language of which cannot confine his rights to property ascertained at the time of the death, and is answered by the fact that an executor might sue thereon for such property of testator as was afterwards discovered.

If parties owing debts to testator in foreign countries should come hither, the ordinary might at common law claim the debts; but till it is shewn that the party claiming as representative here has power derived under an *English* court, *Tourton v. Flower* proves that a foreign administration would be unavailing. The executor has only authority to represent the testator under the probate. If cotemporaneous grants of administration were made here and in *Ireland*, or any of the *British* plantations (*a*), or in a foreign country, to different kin of a party dying here, the domicile of the deceased would decide who was entitled to represent the deceased here, and to receive the grant of administration. That administration would be paramount every where, and there would not be two classes of representatives, abroad and here. (*b*). The selling out the *rentes* was the payment abroad of a debt due to the testator abroad, and does not alter the nature of the property (*c*). As the produce of *French* *rentes* came as assets into the hands of a party in this country, who received and administered them as an executor, mixing them with other funds of testator, it is liable to duty, whether he could have compelled

(*a*) See *Burn v. Cole*, Ambl. 415.

(*b*) But see *Toller*, 87—106.

(*c*) See *Currie v. Bircham*, ante, 255. n. The *rentes* being previously a chose in action. *Rex v. Capper*, 5 Price, 266.

the sale in *France* without the act of a *French* court or not.

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LORD LYNTHURST C. B. now delivered the judgment of the court.—This case arises upon the statute 55 G. 3. c. 184. by which a stamp duty is imposed upon the probate of wills. By the terms of the act of parliament, the amount of the duty is regulated by “the value of the estate and effects for or in respect of which the probate or letters of administration shall be granted;” and the question therefore is, for and in respect of what estate and effects this probate is granted in the present instance.

Formerly, in cases of intestacy, the ordinary or spiritual judge had a right to administer. The probate of wills, as *Blackstone* observes (*a*), followed of course; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing the chattels for the good of the soul was superseded thereby; but when probate has passed, that is, when the ordinary has declared he is satisfied as to the will, the executor derives his power, not from the probate, but from the will. *Ashurst J.* in *Smith v. Milles* (*b*), says expressly, “The executor has a right, immediately upon the death of the testator; probate is a mere ceremony; but when passed, the executor does not derive his title under the probate, but under the will: the probate is only evidence of his right, and is necessary to enable him to sue, but he may release, &c. before probate.” So *Plowden* 280. probate is but a confirmation and allowance of what the testator has done. The jurisdiction to grant probate is regulated by the place of the testator’s death, and the local situation of his effects at the time of his

(*a*) 2 Comm. 494.

(*b*) 1 T. R. 480.

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death: if, for example, he die in one diocese, and have *bona notabilia*, that is, goods to the value of 5*l.* at the time of his death in another diocese in the same province, the jurisdiction belongs to the metropolitan. If he have also, at the time of his death, effects to the above amount in more than one diocese of the province, the archbishops shall, in each province, grant a probate according to the *bona notabilia* within their respective jurisdictions. The probate is granted in respect of the effects that are within the jurisdiction of the spiritual judge at the time of the testator's death, and the jurisdiction is exercised in respect of these effects only. If the executor thinks fit he may remove them from one jurisdiction to another; he may shift them from jurisdiction to jurisdiction; but that does not affect the right of granting probate which is regulated by the local situation of the effects at the testator's death; and if they are removed by the executor into another jurisdiction, it is not necessary to obtain any sanction or authority from such jurisdiction. But it is said that the property in this case was part of the assets of the testator, and was received as such by the executor. Undoubtedly the rentes did form part of the testator's assets. The effects of the testator are assets, wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain there, and are wholly administered there by the executor, are equally assets. Probates, however, are not granted in respect of the assets generally, but in respect of such part of them as are, at the time of the testator's death, within the jurisdiction of the spiritual judge by whom they are granted.

It was also urged that the property in this case was obtained by means of the probate, and was therefore liable to the duty. It is true a notarial copy of the probate, and a certificate of the burial, with a notarial copy or

extract of the will, shewing the appointment of the defendant as executor, were produced to the bank of *France*; upon which that body, without the intervention, as it seems, of any tribunal there, allowed the rentes to be sold; they thus appearing to be satisfied by these documents, that the defendant was executor and entitled to the property, and acting accordingly. Whether they would have been satisfied with any other evidence, and without the production of a copy of the probate, we have no means of determining. But admitting the production of the notarial copy of the probate to be necessary to satisfy the bank of the title of the executor, that circumstance does not appear to us to affect the question, which is, Whether the probate was granted for or in respect of this property? It could not be so granted, because this property was, at the death of the testator, in a foreign country, and consequently out of the jurisdiction of the spiritual judge. In the case of *Logan v. Fairlie*, (a) which was cited in the argument, a part of the funds was remitted from *India* to *England* after the testator's death, and the learned judge, upon the facts before him, considered that the portion so remitted was administered here, so as to incur liability to pay legacy duty. But it is not the administration of the assets that renders the probate duty payable, but the local situation of them at the testator's death. We think, therefore, that the verdict should be entered for the defendant.

Judgment accordingly. (b)

(a) 2 Sim. and Stu. 284.

(b) This case, as well as *In re Ewing*, was alluded to in the argument of *Jackson v. Fordes*, in the Court of Chancery, Feb. 16, 1831. The question there was respecting probate and legacy duty on assets of a testator domiciled in *India*, and dying there, which assets were possessed by his executors resident there, under a probate granted by the Supreme Court of *Bombay*, and afterwards arrived here and became subject to the administrative power of the Court of Chancery. The Lord Chancellor *Brougham* directed a case to be made, in order that the opinion of the Court of Exchequer thereon might be certified to him.

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POOLEY Assignee of SYER *against* MILLARD.

**Practice.**  
Costs of new trial, where the event is different from that of the first.

**T**HE defendant had obtained a verdict. A rule for a new trial was afterwards made absolute on the following terms; the defendant to have the costs of both trials if he succeed in the next trial; if the plaintiff succeed, he is only to have the costs of the second trial.

*Kelly* in support of the rule.

*B. Andrews* against it. (a)

(a) For by the practice of the Exchequer if the plaintiff should succeed on the second trial, the events of the two trials having been contradictory, neither party would be entitled to the costs of the first in the absence of any order of the court made as above on the motion for a second trial. See *Das's Practice of the Exchequer*, 149.



WESTERDALE *against* KEMP.

An affidavit of the truth of a plea in abatement, sworn nine days before the delivery of the declaration to which it is pleaded, will not support such plea.

**A**LLEXANDER moved to set aside an interlocutory judgment for irregularity. Action on a bill—venue *Middlesex*. The defendant was a member of the *Huddersfield* Joint Stock Shipping Company. The declaration was delivered on the 22d of *November*.—Plea in abatement, that the promises in the declaration, if any, were made jointly with other persons, and not by the defendant alone. The affidavit of the truth of the plea had been sworn by the defendant at *Huddersfield*, where he resided, on the 13th of *November*.

**BAYLEY B.**—An affidavit made on the 13th of *November* will not support a plea denying the promises laid in a declaration which did not then exist, and was not delivered till nine days after.

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**GARROW B.** intimated that perjury could not be assigned on the affidavit. (a)

A rule nisi having been granted on an affidavit of merits and payment of costs,

Affidavit of  
merits must  
be of belief of  
good defence  
on the merits.

*Blackburne* shewed cause, objecting to the affidavit that it was not in the usual terms of belief, "that the defendant has a good defence on the merits," but "that the defendant has a good and meritorious defence to the action."—An affidavit that a defendant has "a good defence to the action" was held bad in *Grottick v. Bailey*. (b)

**BAYLEY B.**—The defendant must lay a foundation for his application to the Court in the usual form, and the Court cannot tell for what reason it has been here deviated from.

Rule enlarged on paying the costs of the application,

(a) *Lang v. Comber*, 4 East, 348. the affidavit verifying the plea was sworn by defendant at Liverpool on the day the declaration was filed in London, and, as it was urged, before he could have seen the declaration. But *per cur.* he might have had good reasons for believing that what he swore accorded with the truth; *e.g.* from knowledge of the cause of dispute, or from the communication of the plaintiff's attorney as to the nature of the declaration which would be filed: As in fact the affidavit did accord with the truth, they would not consider the plea as a nullity, but left the plaintiff to his indictment for perjury, if he thought he had sufficient grounds to institute it. They alluded to the difficulty of a defendant at a great distance from London availing himself of a plea in abatement within four days after filing the declaration, though such a plea might often be honest and proper. See also *Baskett v. Barnard*, 4 M. & S. 332.

(b) 5 Bar. & Ald. 703.

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in order to give time for a proper affidavit; and afterwards made absolute on the further terms of pleading specially and trying the cause at the Sittings in Term.

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The KING in aid of HOLLIS *against* BINGHAM.

In *scire facias* against the consor of a recognizance to the crown, no costs are recoverable by the defendant, though he succeed on demurrer and in error.

**HOLLIS**, a distributor of stamps, had issued three extents in aid against the defendant a sub-distributor, to recover debts due from him for stamp duties, received by him as agent of *Hollis*. The defendant traversed the extents, and afterwards entered into a recognizance to the Crown, conditioned to abide the award of *D.* respecting them. *D.* declining to undertake the arbitration, a rule was obtained for substituting *M.* as arbitrator, who made his award accordingly. The defendant not performing the award, a *scire facias* on the recognizance issued from the King's Remembrancer's Office.

Plea—after setting out the condition for abiding the award of *D.*—*nil tuel agard*. Replication, that after the making the recognizance, it was by rule of Court ordered, that *M.* should be substituted for *D.* as arbitrator, and that *M.* made his award, &c.—Demurrer and joinder.

After argument the judgment of the Court of Exchequer was for the defendant, and was affirmed on error before the two Chief Justices in *Michaelmas* Term, 1830; their decision being in effect, that defendant by refusing to perform the award of *M.* had not forfeited his recognizance to submit to the award of *D.*, though *M.* had been substituted by the order of the Court; after judgment in error, an order was drawn up by the officer,

giving the defendant's costs of the argument of the demurrer to the defendant. On that order the above costs, as well as those of the writ of error were taxed.

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*Manning* for the Crown obtained a rule to discharge that part of the order which directed payment of the defendant's costs for irregularity, with costs.

21st Jan.

*Dampier* shewed cause. The question is, whether the party using the name of the Crown in aid of his claim against a defendant, shall pay costs to that defendant on his ultimate success? The terms of 33 H. 8. c. 39. s. 54., by which the King in suits on specialties made to him or his use, shall recover his debt, costs, and damages, do not include cases where a private prosecutor acts in aid of the Crown. *Hollis*, if successful, might have received his costs out of the surplus of the produce of the sale under the extents in aid: (a) he is, therefore, separate from the Crown in interest, and as he might receive, so, if unsuccessful, he must pay costs. In *Rex v. Boyle*, (b) a party issuing an extent in aid against an insolvent agent of an Insurance Company, in order to secure stamp duties received by him, was held not entitled to recover costs from a defendant under 53 G. 3. c. 108. s. 23., which gives costs to the Crown in *proceedings* had in the name of the King, or of any person on his behalf, for recovery of duties, debts, or penalties, due under the stamp acts; for an extent in aid is not an immediate proceeding by the Crown against a defendant, though an immediate extent might have issued for a debt of that nature.

10th Feb.  
 Gray's-Inn  
 Hall.

*Manning* in support of the rule.—The Court had no power to grant costs against the prosecutor in this case, though the suit was instituted in the King's name, not

(a) 57 G. 3. c. 117. s. 2; see 53 G. 3. c. 108. s. 23.

(b) 1 Pri. R. 434.

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on behalf of the Crown itself, but of its officer. *Rex v. Corum* (a) is a stronger case, where the prosecutor, a farmer of post-horse duties, instituted a suit to recover those duties, which could not therefore become the property of the Crown; and on verdict for defendant, he was held not entitled to costs. It appears from *Rex v. Miles*, (b) that costs are not recoverable in *scire facias*, where the prosecutor, who uses the name of the King to repeal a patent succeeds for the Crown is in fact the prosecutor, and 8 & 9 W. 3. c. 3. s. 11. refers to civil suits only. It might there be unnecessary to use the name of the Crown, for *Brewster v. Weld* (c) shews that a *scire facias* to repeal a patent lies at suit of a private person if prejudiced thereby, whereas here the King was necessarily made a plaintiff in order to put the recognizance in suit. All costs are given by particular statutes; the only statutes giving them to defendants, are 23 H. 8. c. 15. and 4 J. 1. c. 3. in particular actions, but they do not include the King, nor does any statute give costs in *scire facias* on a recognizance. *Golding v. Dias* (d) shews that costs in error are only recoverable under 3 H. 7. c. 10. by *plaintiffs* who have obtained judgment below, which is afterwards affirmed, and it was there held, that an avowant in *replevin*, though an actor, was not such a plaintiff.

*Dampier*.—*Golding v. Dias* is now overruled in *Ricketts v. Lewis* and others. (e)

LORD LYNTHURST C. B.—It is clear from *Rex v. Corum* and *Rex v. Miles* that the defendant is not entitled to costs.

Rule Absolute.

(a) 1 Anstr. 50. *Manning's Exch. Pr.* 69. (b) 7 T. R. 367.  
 (c) 6 Mod. 329. (d) 10 East. 2.  
 (e) 1 Bar. & Adolph. 197. Tr. 1830.

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LAMB *against* BURNETT.

**TRESPASS** for assaulting plaintiff on board the ship called the *Scaleby Castle* on the high seas, and striking and imprisoning him, and for putting him in irons, and keeping him so in irons and imprisoned for twenty-four hours ; second count for an assault and false imprisonment only ; third count for a common assault.

Pleas. — First, General issue, Not guilty. Second, as to making an assault on the plaintiff, and striking and knocking him down to and upon the deck of the said ship or vessel in the said first count mentioned, and with his fists and with a certain rope giving and striking the plaintiff a few of the blows and strokes in the said first count mentioned, and imprisoning the plaintiff, and putting and placing the plaintiff into irons, and keeping and continuing him in irons and imprisoned for the said space of time in the said first count mentioned, as is therein mentioned — defendant says, *actio non*. — Because he says, that the defendant, before and at the said time, when, &c. in the said first count mentioned, was the master and captain of a certain ship or vessel trading to *China* in the service of the united company of merchants of *England* trading to the *East Indies*, called the *Scaleby Castle*, and that the said plaintiff then was a mariner in and belonging to, and on board the said ship under the command of defendant, to wit, at, &c., and defendant so

*A*, a seaman on board an Indiaman at anchor in Macao river in China, within two or three miles from Macao, and near several other Indiamen, was guilty of disobedience to the gunner in the captain's absence. Three days after, the captain came on board, and ordered *A*. to be flogged. The plaintiff, another seaman, disobeyed these orders, and resisted their execution in a mutinous and disorderly manner, for which he was himself flogged by the like orders: Held, that there was no legal necessity to inflict *A*'s punishment immediately

after his offence ; and that therefore the captain was justified in moderately flogging the plaintiff for mutinous disobedience to his lawful order to flog *A*. Also, that a captain's power to inflict moderate corporal punishment exists on board a ship, not only while at sea, but when in a foreign river or port near the land, and within reach of assistance from other ships of the same nation.

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being master and captain of said ship, and in the actual exercise of his said office, and plaintiff so being a mariner in and on board of the said ship, and under the command of the defendant as aforesaid, he, plaintiff, a little before the said time when, &c. in the said first count mentioned, conducted and behaved himself in and on board the said ship in a riotous, mutinous and disorderly manner, and then and there refused to obey, and to permit to be obeyed by divers other sailors, then on board of the said ship, under the command of the defendant, the lawful and necessary commands of the defendant, and then and there resisted defendant in the performance of his duty as such master and captain as aforesaid, to the evil and pernicious example of the said other sailors then on board the said ship, to wit, at, &c.; therefore the defendant, so being master and captain of said ship as aforesaid for the preservation of discipline and order in the said ship, and to punish plaintiff for his said riotous, mutinous and disorderly conduct, and to enforce obedience to the lawful commands of the defendant as such master and captain as aforesaid, did, at the said time, when, &c. in the said first count mentioned, make an assault on plaintiff, and did strike and knock plaintiff down to and upon the deck of the said ship, and with his fists, and with a certain rope, did give and strike the plaintiff a few of the blows and strokes in the said first count mentioned, and because it was then and there necessary and proper that the plaintiff should be further punished for his said riotous, mutinous and disorderly conduct, and be kept separate and apart from the said other sailors then on board of the said ship, and be imprisoned; and because plaintiff could not be safely and securely kept separate and apart from the said other sailors in prison without being put and placed into irons, he, defendant, at the said time, when, &c. in the

said first count mentioned, imprisoned the plaintiff, and put and placed him into irons, and kept and continued him so in irons and imprisoned for the said space of time in the said first count mentioned, the same being a reasonable and proper time in that behalf, as it was lawful for him to do for the cause aforesaid, using no unnecessary violence, and doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the same supposed trespasses, &c. (Verification.) A third plea nearly similar. Replication *similiter* to first plea. — *De injuriâ* to second and third pleas.

At the trial at the Exchequer Sittings in *London* before *Bayley B.* and a special jury, it appeared that on the 19th *December*, 1829, the *East India* Company's ship *Scaleby Castle* was lying in *Macao* river, near several other *Indiamen*, and within two or three miles from *Macao*. The defendant, her captain, was on shore. Some disrespectful language had been used by *Cronan*, one of the seamen to the gunner, and a disturbance ensued in the ship. *Cronan* then said to the chief mate that he would do no more duty till the captain came aboard. A communication having been made to the captain, he came on board on the night of the 23rd, and on the 24th a court of inquiry was held, at which the officers agreed that *Cronan* must be flogged. On the 24th the crew were assembled, and the defendant called *Cronan* forward and told him of his offence, and that he would be flogged. Quarter masters, of whom the plaintiff was one, were called to tie him up, but none came. Plaintiff came forward, and asked, in the name of the crew, by what authority the defendant proposed to flog *Cronan*. Several complaints were made by the crew against the officers. All the officers were armed, but it did not distinctly appear that any of the crew were. A rush was made by the crew towards *Cronan*; among the foremost was the plaintiff, who seized *Cro-*

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*nan* or the man who held him. Great confusion ensued. The defendant ordered a pistol to be fired, on which several boats with armed officers and men put off from the other ships, and in a few minutes boarded the *Scaleby Castle*. No trial or inquiry then took place. *Cronan* and the plaintiff were then secured and flogged, and the plaintiff remained in irons twenty-four hours.

Mr. Baron BAYLEY left it to the jury to say whether the plaintiff had behaved in a riotous, mutinous or disorderly manner, or in a mutinous manner only; or had refused to obey, and permit to be obeyed, the lawful commands of the defendant as master, thereby setting the crew a pernicious example; and whether the conduct for which *Cronan* was ordered to be punished was disorderly (*a*), and whether, if disorderly, he was guilty of it.

The jury found that the plaintiff's conduct was disorderly and mutinous, and that *Cronan* had been guilty of like conduct, and gave their

Verdict for the defendant.

*R. V. Richards* moved for a new trial. The conduct of the plaintiff, if disorderly, might, *ex necessitate* be the subject of corporal punishment, if occurring at sea, but the general authority to inflict summary punishment cannot exist in the master of a merchant ship while lying close to shore in a river or bay. If such a power can exist in *Macao* river, it would equally prevail in the harbour of *Margate* or even the docks in the *Thames*. If there was no power to flog at all, the defendant was bound to prove the whole facts laid in his pleas; and as they went to justify the whole trespasses complained of, no new assignment of excess in the punishment

(a) See *Abbott on Shipping*, 3rd Edit. 163.

was necessary, and the general replication *de injuriâ* was sufficient, *Phillips v. Howgate* (a).—[*Bayley* B. There the defendant failed to prove all that was material in his plea, here the whole justification was established.] The power to flog *Cronan* must decide whether the plaintiff was guilty of disobedience to lawful orders of the defendant, now the power to flog arises from necessity, and can only be exercised when such necessity exists, viz. at the time when a mutiny prevails. *Cronan* having been confined three days for an offence previously committed, the captain had no longer any right to flog him, the necessity to do so having passed.

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Lord LYNTHURST C. B.—There does not appear to me to be any ground whatever to object to the direction of the learned judge. The first question is as to the conduct of *Cronan*, who, it appears clearly on the evidence, had taken a part in the riotous proceedings of the 19th during the captain's absence, and had stated to the officer in command that he would not obey any orders till the captain came on board. It appears that in consequence of this the captain was immediately sent for, and on his arrival on board, on the 23rd, directed *Cronan* to be flogged. I apprehend that for the purpose of enforcing obedience in the ship's crew, the captain has authority to order any of them who misconduct themselves to be moderately and properly corrected; nor is it any objection that an interval elapsed between the offence and the punishment, for the moment the captain arrived on board he directed the punishment to be inflicted. The next question is, what was the conduct of the plaintiff on the latter occasion? He appears to have been at the head of those who opposed the infliction of punishment on *Cronan*, and there

(a) 5 B. & A. 220.

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can be no doubt on the evidence that their conduct on the 23rd and 24th was extremely mutinous. Under such circumstances, it appears to me that the captain was justified in authorizing punishment to be inflicted on the plaintiff. No question can be raised on this record as to the extent of such punishment. The verdict, then, appears to me to be perfectly right, nor do I perceive any objection on the record. The statement in the plea is, that the plaintiff behaved in "a riotous, mutinous and disorderly manner, and then and there refused to obey, and permit to be obeyed by the other sailors on board this ship, the lawful and necessary commands of the defendant, and resisted him in the performance of his duty." There can be no objection upon that statement upon the record, and if any one of the crew refuses to obey the lawful commands of the master of a vessel, the master is justified in inflicting such punishment on him as may be necessary to put an end to such conduct. I think, therefore, that with reference to the record, as well as to the evidence on the trial, there is no ground to object to the proceedings.

GARROW B.—I entirely concur in the judgment which has been delivered, and am of opinion that no delay should intervene in pronouncing our decision, lest any idea should be suggested that we entertain any doubt on the subject. If any officer on board conducts himself with intemperance or unnecessary cruelty in administering the discipline of a ship, or in resisting the mutinous conduct of the crew, he is responsible for his conduct before a jury at the suit of any seaman of the ship. The officers being subject to this high responsibility, the sailors navigating the merchant ships of this country must not be suffered to leave it under the impression that it is for them and not for the officers to administer the discipline of a ship, or that they

are to constitute a court of appeal from the acts of their officers in repelling a mutiny which prevents the ship's duty from being carried on.

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VAUGHAN B.—If any reasonable doubt could be entertained on this very important subject, I should have wished to put it in a train for further inquiry. This is an application to the sound discretion of the court to review the verdict as being against evidence. Two questions were left to the jury, First, whether *Cronan* was guilty of the offence imputed to him ; and Secondly, whether the plaintiff was or was not guilty of riotous or disorderly conduct. The plaintiff's counsel found it difficult to contend that there was not evidence sufficient to satisfy the jury that the crew was in a mutinous state on the 23rd, but endeavoured to raise the question, whether, under the circumstances in which the captain was placed, he could justify the assault. He suggested that this case differed much from the ordinary case of mutiny at sea, and that the ship being within two miles of the shore, and the captain having the assistance of other vessels near him, there was no necessity for the exercise of this power. But the authority of a captain does not contract or expand according to his distance from shore. If he is on board his ship exercising the authority of captain, and the crew, or any mariner is mutinous, it is of most vital importance that his power should be exercised as far as moderate correction extends. If any excessive punishment was inflicted on this occasion, it is not put in issue on this record by replication or new assignment. It ought not to go forth for a moment that any doubt could be entertained as to the propriety of this captain's conduct. Under the circumstances here ascertained, no further question can arise in these proceedings, whether the facts stated in the plea amount to a justification.

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BAYLEY B.—If I entertained any doubt of the propriety of the verdict, I should be the last person to decide against a further inquiry: but having considered the case much since the trial, I have a perfect conviction that the verdict was right, and I think that we might occasion great prejudice to the merchant service if we granted this rule. Speaking generally, if there was a scintilla of doubt, I should be particularly anxious that the rights of men standing in the situation of ordinary seamen should be fully canvassed. But this case presents no reasonable doubt. It makes no difference that this mutiny took place in a foreign port or river, and not at sea. The ship may be equally sacrificed, or the power to navigate her back may be equally lost in both situations, unless the commander is enabled to adopt that course which the law has cautiously put in his power.

The law authorizes him, in case of misconduct of a mariner, to inflict a punishment, and proportionate to the offence. Now, though the offender may bring his action if the punishment was disproportionate, he must adopt the course pointed out by the law for that purpose. Here he does not adopt that course, but says there was no cause for punishment at all. The cause charged being that the plaintiff behaved in a riotous and mutinous manner, and refused to obey, and permit to be obeyed by the other sailors on board, the defendant's lawful commands, and resisted the defendant in the performance of his duty, and set a pernicious example to the other sailors. If the defendant had only established that the ship was in a state of mutiny, and that the plaintiff concurred in it, that would have justified the captain in punishing the plaintiff; but on this evidence the whole charge contained in the plea was made out. There is no doubt that the ship was in a state of mutiny on the 23rd, when *Cronan* was called

forward to receive punishment for the offence proved to have been committed by him on the 19th. Before any attempt to punish him, the captain told him of his offence, and he admitted having used a disorderly expression to his officer, the gunner. Then if he was guilty of that offence, was not the captain justified in directing him to be punished for the sake of preserving discipline? and can a sailor interfere and say that no punishment shall take place? The conduct of the plaintiff at this period as connected with that of others on board, shewed that he intended to prevent the punishment of *Cronan* from taking place at all. The interference was not to remind the captain that *Cronan's* case had not been properly heard, or to prove his innocence, but in order that there should be no flogging on board. Nor did the interval of time between the offence and the punishment take away the right to punish. It was reasonable that in the captain's absence the officers should not take on themselves to inflict the punishment which ought to take place. They accordingly waited till his arrival when, on their representation, the party is punished. Under these circumstances, it seems to me that the captain was fully justified in punishing *Cronan*, and that the plaintiff, with the rest of the crew, had no right to insist that flogging should not take place. The verdict, therefore, is right, and there is no ground for disturbing it.

Rule refused.

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ELKINS, a Side Clerk in the office of Clerk of the Pleas and ELKINS, Gent. one, &c., *against* HARDING' Gent.

One of the original officers of the Exchequer may sue jointly with an unprivileged person by *capias* of privilege without losing such privilege, and is therefore entitled to costs on recovering less than 5*l.* against an attorney of K.B. resident in London, notwithstanding section 10 of the London Court of Requests Act, 39 G. 3. c. civ.

ASSUMPSIT against the defendant, who at the time of action brought was an attorney of the King's Bench only, for agency business done for him in the Exchequer by the first-named plaintiff and his partner, at that time an attorney of the King's Bench only. The verdict was for 2*l.* 1*s.* The defendant was resident in *London*, within 39 and 40 Geo. 3. c. civ. the *London* Court of Requests Act.

R. V. Richards obtained a rule to enter a suggestion on the roll, under sect. 10 and sect. 12 of that act, in order to deprive the plaintiffs of costs, citing *Bird v. Pasmore*, K. B. in last Michaelmas term, where *Little-dale*, J. sitting alone, held that an attorney of the K. B. suing an attorney of the same court resident in *London* by bill, thus losing his privilege, sued as a private individual, and must therefore be deprived of his costs, on recovering less than 5*l.*

Chilton shewed cause.—The case cited is *contrary* to *Hodding v. Warrand* (a). However, as in both those cases the defendant was an attorney of the *same* court, and was therefore sued by bill, and not by attachment of privilege as in the present case, they do not apply. Now, in *Board v. Parker* (b), it was held that an attorney, a plaintiff, suing by attachment of privilege in the superior court, of which he was a minister, and recovering less

(a) 7 East, 50. n.

(b) Id. 47.

than 5*l.* could not be deprived of his costs, for not having sued in the *London* Court of Requests. *Johnson v. Bray* (a) is to the same effect. Had this been the case of a side clerk suing alone by *capias* of privilege, he might have even arrested the defendant, though an attorney of another court, *Walker*, gent. a side clerk in the office of Pleas, v. *Rushbury*, gent. (b), *Bowyer*, gent. a side clerk of the King's Remembrancer's office, v. *Hoskins* (c). Now, an officer of this court is entitled to sue here by *capias* of privilege, though a person not privileged be a co-plaintiff, *Dixon*, clerk of the Pipe, and two others not privileged, v. *Walker* (d); though, if a privileged person is sued with a common person, on their joint contract, he, as a defendant, loses his privilege, on the ground that the plaintiff's right of action would be destroyed, by being obliged to sue the joint contractors in a different manner (e).

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R. V. Richards, in support of the rule. — It is agreed that attorneys resident in *London* may be sued in the Court of Requests there, 39 and 40 Geo. 3. c. civ. sect. 10, and that, if they do not sue by *capias* of privilege and recover less than 5*l.* they lose the costs; *Bird v. Pasmore*. The question then, is, whether an officer of this court, being an attorney, is entitled to sue by *capias* of privilege with his partner, who though an attorney, is not entitled so to sue, for a bill of costs due to both? Here the two plaintiffs sue in different rights, which thus differs from the cases cited. Nor is the side clerk here entitled to his privilege, as an officer of the crown, whose business would be impeded by his absence.

(a) 2 Br. & B. 698.

(b) 9 Price, 16.

(c) 1 Y. & J. 199.

(d) 1 Barton, 48. *Manning's Exch. Pr.* 251., where other cases are collected.

(e) *Molin v. Cook*, 1 Vent. 398.; *Gilbert's C. P.* 171.; *Manning's Pr.* 145.

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LORD LYNTHURST, C. B. — The cases cited establish that an officer of this court, as originally constituted, is entitled to sue an attorney of another court by *capias* of privilege, and that, if he sues jointly with another, his privilege extends itself to such co-plaintiff. Whether this privilege extends to attorneys admitted under the new constitution of the court is not the question here.

BAYLEY B. — The ground on which Exchequer privilege stands, is stated in *Manning's Practice* to be, that the king's business may not be impeded through the absence of his officers, a reason which holds equally in cases where the officer is a sole plaintiff, or sues with others.

Rule discharged (a).

(a) The privilege of attorneys to sue in the court of which they are ministers, is not so much for their benefit as for that of their clients. Tidd, 9th Ed. 82.; whereas that of the aide clerks and officers of the Exchequer is originally founded on their attendance, these being considered indispensable to the service of the crown.

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In order to obtain a *distringas* without personal service of a *venire*, a full and distinct affidavit is necessary to satisfy the Court that the defendant keeps out of the way to avoid personal service. (See 7 & 8 Geo. 4. c. 71. s. 5. post, 289, n.)

R. V. RICHARDS moved for a *distringas* to compel an appearance on the following affidavit in order to dispense with personal service of a *venire* required by 7 and 8 Geo. 4. c. 71. sect. 5, and on affidavit that no appearance had been entered for the defendant.

“ *J. B.* of, &c. maketh oath, and saith, that he did on the 11th January instant, serve the above-named defendant with a true copy of a writ of *venire facias ad respondendum* in this cause, appearing to be regularly issued out of, and under the seal of this honourable Court,

Geo. 4. c. 71. s. 5. post, 289, n.)

against the said defendant at the suit of the above-named plaintiff, and returnable on the 11th day of January by delivering a true copy thereof, and at the same time shewing the said original writ to *E. D.*, at the dwelling-house of the said defendant, situate in *K.* street in *M*; and this deponent further saith, that he used all the means in his power to serve the said defendant personally, with the said writ of *venire facias*, and that he attended for several days at the dwelling-house of the said defendant for that purpose, but without meeting with the said defendant: that on the first day of the deponent's attendance, namely, on the 8th day of *January* instant, this deponent saw the said *E. D.*, who informed this deponent that the said defendant was not at home: that this deponent then informed the said *E. D.* that the object of his calling was to serve the said defendant with the said writ of *venire facias*, and desired the said *E. D.* to inform the said defendant that he, this deponent, would call again on the 10th day of *January* instant, at eleven o'clock, for the purpose of serving the said defendant: that he, this deponent, called accordingly, at the time appointed, when this deponent again saw the said *E. D.* who informed him, this deponent, that the said defendant was not there; when this deponent, as on the preceding day, informed the said *E. D.* of the object of his calling, and that he, this deponent, would call again on the following day at eleven o'clock, for the purpose of serving the said defendant with the said writ of *venire facias*: that on the following day, being the 11th day of *January* instant, this deponent did accordingly call at the said defendant's dwelling-house at the time appointed, for the purpose of serving her with the said writ: that this deponent again saw the said *E. D.* who informed this deponent that the said defendant was not there; when this deponent left a

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true copy of the said writ of *venire facias ad respondendum* with the said *E. D.* for the said defendant, and at the same time shewed the said *E. D.* the said original writ: *and this deponent saith, that he verily believes that the said defendant hath kept out of the way for the purpose of avoiding being served with the said writ* — that under the said copy was written an English notice to the said defendant of the intent of such service, pursuant to the statute; and that a writ of *quo minus* was issued out of, and under the seal of this honourable court, on the said 5th November last, against the said defendant, at the suit of the said plaintiff: that an *alias quo minus* was issued thereupon, on the 13th November, and that a *pluries quo minus* was issued thereupon on the 11th December last, and that he, this deponent, hath frequently endeavoured to serve the said defendant with the said writ, but without success; and that he believes that the said defendant hath kept out of the way for the purpose of avoiding being served with the said writ; for though he, this deponent, has often inquired at the said defendant's dwelling-house, where and at what time the said defendant could be met with, he has always been told that the said defendant was not there, nor did they inform him where the said defendant was, or at what time she could be met with; but always positively refused so to do."

He urged that, if this affidavit was held insufficient, personal service would be always essential, though out-lawry could not take place in this court.

BAYLEY B.—After reading through the judgment of the Court in *Pitt v. Eldred*, as stated *ante* p.129, added—The Court ought not to grant the rule, unless it be satisfied that the defendant keeps out of the way to avoid the

service. That can only be done by a very full and distinct affidavit. Now, it is not inconsistent with the facts here deposed, that the defendant was from home; she is not sworn to have been seen in the neighbourhood, nor does it appear to have been asked, whether she was at home, or if not, when she was likely to return. Had those questions been asked without answers being given, it might have afforded a foundation for our belief that the defendant kept out of the way to avoid the service. For all that appears here, the deponent might have been told the defendant was absent, and not likely to return soon. All that passed should have been stated, and if nothing more passed than here appears, it should have been so sworn. Nor is E. D. sworn to be the defendant's servant. Now, as such a person might have been placed at the defendant's house on purpose, in order to answer particular enquiries, I think her connexion with the defendant as a servant, or an inmate, or a member of the family, having means of knowledge, should have appeared; nor is any reason stated for believing that the defendant lived on the premises.

VAUGHAN B.—The writ prayed for being in the nature of a summary execution, such circumstances should have been disclosed as would be totally inconsistent with the fact of the defendant's absence; for example, on a journey. Had it appeared that the question was asked whether the defendant was absent, and no answer had been given, or it had been replied, "I won't tell you," or if we had collected from the servant's answer, that defendant was at home, or in the town, we might have been enabled clearly to see that the defendant kept out of the way to avoid the service.

Rule refused.

See *Godkin v. Redgate*, post 287.

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DOR V. ROE.

If a declaration in ejectment is duly served before the essoin day, the omission in the notice of the term in which the tenant is to appear is immaterial.

CROMPTON moved for judgment against the casual ejector. The notice to appear, subjoined to the declaration, stated no term in which the tenant was to appear, but was general for his appearance in this Court. The declaration was regularly served before the essoin day.

BAYLEY B.—The declaration having being served before the term, the general notice to appear, is a notice to appear in the next term, though not so specified, and cannot mislead the tenant in possession.

Usual rule granted. (a)

(a) See 2 Chitty's Reports, 171—173. Tidd, 9 Ed. 1208.

The ATTORNEY-GENERAL V. CARPENTER.

Appearances in court in person in a suit in the King's Remembrancer's Office may be recorded in court without fee to a clerk in court.

A SUBPÆNA having been served on the defendant, at suit of the Attorney-general, he applied at the office to enter his appearance in person. The Clerk in Court refused to do so, except on payment of 7s. 8d. for entering the appearance, and 6s. 8d. for a term fee. The defendant was ultimately complied with, under protest. He now moved in person for a rule, calling on the officer to refund the money. The officers certified, that the appearance of the defendant in Court might be recorded there, without the act of a clerk in court, but that the defendant

could not call on them to enter an appearance in the office without paying the above fees.

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BAYLEY B.—Though the ordinary course is to enter an appearance in the office by the agency of a clerk in court, I have no doubt, that an appearance in person in court may be recorded in court. Every defendant has a clear right to appear in person, according to process, without being compelled to employ an attorney to enter his appearance. There are several instances to this effect in Mr. Price's work on the Revenue Practice. (a) Both sums paid in this case must be returned ; for without a retainer of an attorney, there is no ground for the charge of a term fee.

Rule granted.

(a) Pages 611—621.

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DEBT on bond, conditioned for performance of covenants in another indenture. Breaches were assigned, pursuant to 8 & 9 W. 3. c. 11. s. 8, but by mistake no damages were assessed on them at the first trial, though the plaintiff had a verdict on every issue, but one, which afterwards proved immaterial. A *venire de novo* having been obtained by the plaintiff, a second trial was had with a similar result. (b)

The court has no discretionary power over the costs of an application for a *venire de novo*.

John Evans, (Godson with him,) now moved for the costs of the application for a *venire de novo*, the question

(b) See *ante*, 193. note.

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respecting which, had been reserved till the *postea* came in on the second trial.

Russel Serjt. and E. V. Williams, contra.—The plaintiff is not entitled to receive from the defendants the costs of an application originating in his own mistake, and necessary to secure him from its consequences; for had not he obtained a *venire de novo*, so as to cure the erroneous verdict, he could not have prevented the reversal on error of his judgment for general damages (a). Besides which, on a motion for a *venire de novo*, the successful party only obtains the costs of the second trial. *Lickbarrow v. Mason* (b); *Bird v. Appleton* (c).

LORD LYNTHURST C. B.—The defendant is not bound to watch the manner in which the plaintiff proves his case; and if by the latter's inadvertence, a new formal step is rendered necessary, he must pay the expense of it. In this case, had not the *venire de novo* intervened, a writ of error might have been brought.

BAYLEY B.—The Court has no discretion over these costs. The rule for a *venire de novo* was obtained to repair the plaintiff's neglect in not assessing the damages, and as it thus became essential to the plaintiff to go to a second trial, the expences of the first were thrown away, and the defendant is not bound to pay costs incident to the plaintiff's mistake on the first trial.

VAUGHAN B.—Though the question of costs was reserved on granting the *venire de novo*, I now think that we have no power on the subject.

(a) See the note to *Gainsford v. Griffith*, 1 Saund. 58 a., and *Hardy v. Bern*, 5 T. R. 636.

(b) 6 T. R. 131.

(c) 1 East, 111.

BOLLAND B.—There is a great difference between the grant of a new trial and a *venire de novo*. The Court may fetter the first with such terms, as to costs, as they think proper; whereas after a *venire de novo*, the party succeeding on the second trial is not entitled to the costs of the first.

Rule refused.

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EVANS, Executrix, v. DUNCAN and Another.

CHILTON moved for a rule, calling on Mr. Green, the defendant's attorney, to shew cause why he should not pay the debt and costs in this action, with the costs of the application. Green, who was not an attorney of the Exchequer, had before the administration of justice act, 11 G. 4. and 1 W. 4. c. 70. came into operation, carried on the cause through the medium of a side clerk, and near its close, had given an undertaking to pay the debt and costs, on the plaintiff's consenting to stay proceedings. Now in the King's Bench in *Senior v. Butt*, Hil. 1827, an undertaking by the defendant's attorney to give a note to secure the debt and costs, was enforced on motion, notwithstanding the statute of frauds. For even supposing the contract to be void under that statute, the plaintiff had been deceived by its being given him by the attorney as an available security, and the attorney could not be suffered to take advantage of his own wrong.—[*Bayley B.* In that case the Court of King's Bench had jurisdiction over its own officer.] (a)

An attorney's undertaking to pay his client's debt and costs in an action will be enforced on motion in the court of which he is an attorney, though the undertaking be void by the statute of frauds.

Semble, the summary jurisdiction of the Court of Exchequer reaches an attorney who practised there in the name of a side clerk.

(a) Sir W. Owen, *amicus curiæ*, mentioned a case in which Mr. Baron Hullock had made the same distinction.

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On another day *Chilton* cited *Payne v. Johnson*, Trinity term, 1787, where an order was made absolute by this court, for an attachment against *Hill*, late attorney for the plaintiff for non-payment of the taxed costs of the defendant's solicitor, pursuant to his undertaking. In *Hudson v. Handley*, Trinity, 1830, an attorney of the King's Bench had undertaken to appear in this court for the defendant. No appearance being entered, the court granted a rule, calling on the attorney to shew cause why he should not cause an appearance to be entered for the defendant, pursuant to his undertaking, and pay the costs of the application, as well as any costs occasioned by his neglect to appear for the defendant, which rule was not made absolute, the defendant submitting to its terms.—[*Garrow* B. The rule there proceeded on the ground that an attorney of another court who undertook to appear for a defendant here, might perform his undertaking by the agency of a side clerk.—] If the court has not summary power over the attorney of another court practising here by an agent, the salutary control exercised by the courts over attorneys, will be evaded by their carrying on suits in courts of which they are not themselves members, in the names of attorneys, who like the side clerk in this instance, are not amenable for, or cognizant of, the particular transaction.

BAYLEY B.—I have great difficulty in entertaining the proposition, that the court, in the exercise of its summary jurisdiction, can enforce the payment of a sum of money on motion, which would not be recoverable at law. Through the case cited from the King's Bench is so far in support of the motion, yet as the undertaking was there given in an action, commenced in a court of which the party was not an attorney, the application to enforce it being made in the King's Bench, of which he was an attorney; it is a strong instance against making

the application to this court in the present instance. For Mr. *Green*, not being an attorney of this Court, is a mere stranger, and not an officer. Now in the case cited, the King's Bench must have acted on its power over its attornies. However desirable it may be that this court should have control over all persons conducting a suit in it, yet if it is ascertained on inquiry that it has been the course to apply to the court, of which the party is an attorney, that practice must be adhered to.

A rule *nisi* was granted, and made absolute on the 28th, no cause being shewn.

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WOOLLEY v. BOATES.

TURNER had obtained a rule *nisi* to change the venue from *Somersetshire* to *London*; which rule by the practice of the court, made itself absolute on the day named there in. No cause having been shewn on or before that day, a rule to bring back the venue was now moved for by *John Jervis*, on undertaking to give material evidence in *Somersetshire*. (a) Notice of the latter motion having been given, *Turner* objected to the discharge of the first rule.

The rule to bring back the venue will be granted, though after the rule for changing it has become absolute, but without discharging the former rule.

LORD LYNTHURST, C. B.—Each rule is substantive and not inconsistent with the other. The only cause which could have been shewn against the first rule, would have been by undertaking to give material evidence in the county where the venue was laid, but the time for shewing cause having elapsed, that rule, by the

(a) In the Exchequer, the venue can only be brought back on undertaking to give material evidence in the county where it was originally laid. *Emery v. Emery*, 6 Price, 336. So in *K. B. Price v. Woodburne*, 6 East, 233.

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practice of this Court, became absolute, and the rule for bringing back the venue on a similar undertaking must be granted.

Rule accordingly. (a)

(a) The rule to change the venue is absolute in the first instance in the King's Bench, and the only way in which it can be brought back is by a separate motion. *Tidd*, 9 Ed. 610. In the Exchequer, the rule to change the venue is a rule nisi, making itself absolute without motion if no cause is shown on or before the day named in the rule. So that the practice of the K. B. applies in the Exchequer, where cause is not shown in time in the latter court.

Jan. 31.

ATTORNEY GENERAL v. DIMOND.

Semble, The attorney-general has not power to turn a special case into a special verdict, no leave having been given for that purpose at the trial.

FOLLETT, for the Crown, had applied to turn this case into a special verdict, alleging that the prerogative of the Attorney General to do so, had been frequently recognized.—*Merewether* Serjt. objected, as no liberty to turn the case into a special verdict had been reserved, which appeared to have been done in *The Attorney General v. Bacchus*. (b)

Per Curiam.—As this motion is on the revenue side of the Court, we will suspend judgment till the Revenue Sittings after term. By that time it will be ascertained whether the prerogative of the officers of the crown exists as stated, and if it does exist, it may be executed without our intervention. The finding of the jury being general, the Court is called on to return as their finding, matter which they did not find. The Court will not interfere.

It was afterwards understood that the Attorney-General (*Denman*) refused to proceed in enforcing the prerogative claimed.

(b) 9 Price, 30.

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GODKIN v. REDGATE.

April 22. (a)

R. S. RICHARDS moved for a *distringas*, on default of appearance on the *venire facias*.—The *venire* with the notice to appear annexed to it had been issued, pursuant to 7 and 8 Geo. 4. c. 71. s. 5., but had not been personally served on the defendant.

The affidavit in support of the motion stated, That the deponent on the 15th of *April*, served the defendant with a true copy of a writ of *venire facias ad respondendum* in the Court of Exchequer, appearing to the deponent to be regularly issued out of, and under the seal of the Court, against the said defendant, at suit of the said plaintiff, and returnable on the said 15th of *April*, by delivering a true copy thereof, and at the same time shewing the said original writ to a person at the dwelling house of the defendant, situate in *N.*, in the parish of —, in the town of *N.*, who informed the deponent that he was the son of the said defendant, and which the deponent verily believed, and that defendant used all means in his power to serve the said defendant personally with the said copy of the said writ of *venire facias*, having attended at the dwelling house of the said defendant on the 1st of *April*, where the defendant saw *H. R.* the daughter of the defendant, and informed her that he had a writ against her father, and wished to serve him with a copy of it, when the said *H.* said, that her father was not then at home, nor was he likely to be at home for some time: that deponent stated to the said *H. R.* that he would call at twelve o'clock the next day, to serve her said father with a copy of the said writ: that de-

A *distringas* will not be granted without personal service of the *venire*, pursuant to 7 & 8 G. 4. c. 71. s. 5. unless on facts from which it may reasonably appear to the satisfaction of the court that the defendant kept out of the way to avoid that service.

(a) This case which occurred in Easter Term, has been here inserted out of its order, from a sense of the importance that the practice should be clearly understood.

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ponent accordingly called at the said dwelling house of the said defendant, on the said 2d of *April* instant, at about twelve o'clock, and enquired for the said defendant, when he was informed by *W. R.*, the son of the said defendant, that his father was from home, and not likely to be at home, when deponent also explained to the said *W. R.*, that he had a writ against the said defendant, and wished to serve him with a copy of it, and that he would call again: that he called again at the said dwelling house of defendant on the 15th of *April*, (the return day) pursuant to a further notice thereof, and again inquired for the said defendant, when deponent saw *J. R.* another son of the said defendant, who informed deponent that his father was from home, and not likely to be at home: that deponent verily believes that the said defendant has kept out of the way to avoid the service of the said writ, for the reason following—Because deponent had a previous occasion, about twelve months ago, a copy of a writ to serve on defendant but was not enabled to see him: that deponent has been informed, and believes, that defendant's circumstances are deranged, and that he keeps out of the way to avoid being arrested, or served with process. Concluding with the allegation of the notice of the intent of the service, subjoined to the copy of the *venire*, according to 7 and 8 Geo. 4. c. 7. s. 5.

BAYLEY B. — The affidavit in support of a motion of this kind, ought to disclose circumstances from which it may reasonably “be made appear to the satisfaction of the Court,” (a) that the defendant keeps out of the way to avoid service of the process. In this case, on the 1st of *April*, enquiries are made for the defendant at his house. The answer is, that he is not at home, nor likely to be at home for some time. No reasonable ground is here shewn to found a belief, that either at that time, or

(a) 7 & 8 G. 4. c. 71. s. 5.

between that day and those fixed for calling again, the defendant was at home or in the neighbourhood. Consistently with the affidavit, he might have been at a distant place during all the time, between the 1st and the 15th of *April*; nor does it appear, whether every material part of the conversations with the sons and daughter of the defendant is stated in the affidavit.

Rule refused.

It has been often stated that the plaintiff cannot proceed to outlawry in the Exchequer; *Thomson, C. B. in Horton v. Peake, 1 Price, 309.* saying, there is no such process there. The reason assigned in *Tidd, 9 Ed. 38. 132.* is, that a plaintiff cannot sue there by original. It is, however stated in *Dax's Practice of Exchequer, 21*, that a *venire facias ad respondendum* is an original writ. And the ancient course of enforcing appearance thereto by distringas supports this latter position by analogy to the practice of the King's Bench and Common Pleas, where, in suits by *original*, if defendant did not appear, writs of distringas or distress infinite issued, till he either appeared or the debt was paid with the costs of the writs, by sale of the issues returned *toties quoties*, under 10 G. 3. c. 50. sect. 3. *Tidd, 9 Ed. 110. 111.* This mode of proceeding being found dilatory, expensive, and oppressive to defendants, particularly when residing abroad, (*id. 112.*) a rule of C. P. was made in 1809, to mitigate the evil; see 1 Taunt. 204. And at length by 51 G. 3. c. 124. s. 2. now expired, and replaced, *totidem verbis*, by 7 and 8 G. 4. c. 71. s. 5. after reciting "And whereas the provisions in the said acts authorising plaintiffs, in default of appearance of defendants, to enter a common appearance, or file common bail, as therein directed, are not deemed to extend to proceedings by original and other writs whereupon no *capias* is issued, and it is expedient to extend the provisions of the said former acts to such proceedings;" it was enacted "That in all cases where the plaintiff or plaintiffs shall proceed by original or other writ, and summons or attachment thereupon, or by subpoena and attachment thereupon, in any action at law against any person or persons not having privilege of parliament, no writ of distringas shall issue for default of appearance, but the defendant or defendants shall be served personally with the summons or attachment, at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service, to the effect following:—

"C. D. [*naming the defendant*], you are served with this process at the suit of A. B. [*naming the plaintiff or plaintiffs*] to the intent that you may appear by your attorney in his Majesty's Court of at *Westminster*, at the return hereof, being the day of in order to your defence in this action; and take notice that, in default of

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your appearance, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney."

But in case it shall be made appear to the satisfaction of the court, or, in the vacation, of any judge of the court from which such process shall issue or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant or defendants, that then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the court, or order of such judge as aforesaid, to sue out a writ of distringas to compel the appearance of such defendant or defendants; and that at the time of the execution of such writ of distringas there shall be served on the defendant or defendants, by the officer executing such writ, if he, she, or they can be met with, and if he, she, or they cannot then be met with, there shall be left, at his, her, or their dwelling-house, or other place where such distringas shall be executed, a written notice in the following form :—

"In the Court of *[specifying the Court in which the suit shall be depending]*, between *A. B.* plaintiff, and *C. D.* defendant, *[naming the parties]*: Take notice, that I have this day distrained upon your goods and chattels for the sum of forty shillings, in consequence of your not having appeared by your attorney in the said court, at the return of a writ of returnable there on the day of and that, in default of your appearing to the present writ of distringas at the return thereof, being the day of the said *A. B.* will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney.

"*E. F.* *[the name of the Sheriff's officer.]*"

"To *C. D.* the above-named defendant."

And if such defendant or defendants shall not appear at the return of such original or other writ, or of such distringas, as the case may be, or within eight days after the return thereof, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper court of the personal service of such summons or attachment, and notice written on the foot thereof as aforesaid, or of the due execution of such distringas, and of the service of such notice as is hereby directed on the execution of such distringas, as the case may be, to enter a common appearance for the defendant or defendants, and to proceed thereon as if such defendant or defendants had entered his, her, or their appearance; any law or usage to the contrary notwithstanding; and that such affidavit or affidavits may be made before any judge or commissioner of the court out of or into which such writ shall issue or be returnable, authorized to take affidavits in such court, or else before the proper officer for entering common appearances in such court, or his lawful deputy, and which affidavit is hereby directed to be filed *gratis*.

Notwithstanding the general words at the beginning of the section, which is similar in both acts, it was held in Exchequer, in *Nicholson v. Bonmass*, 3 Price, 263, that where a defendant is abroad, the plaintiff might still issue a distringas on service of the writ at defendant's previous dwelling-house, in order to compel his appearance as before the stat. 51 G. 3. c. 124, (viz. : by sale of issues to the amount of debt and costs), but not for the purpose of enabling the plaintiff to enter an appearance for him under that act, in order to proceeding thereon to final judgment, as if defendant had appeared.

In *Moore v. Taylor*, Trin. 1818 ; 5 Taunton, 71. the court of Common Pleas are said to have doubted whether 51 G. 3. c. 124. sect. 2. extended to the Exchequer. The reporter adds in a note, that a motion for a distringas had, however, been allowed in the Exchequer, but that he had been informed, on inquiry, that there had been a great struggle when the act first passed, whether it should be held to extend to that court, the officers contending *totis viribus* it did not ; but the court held it did.

STAMFORD (Corporation) *against* PAULETT.

STAMFORD
(Corporation)
v.
PAULETT.
April 25.

THE judgment of the Court of Exchequer in this case in Trinity term last, that a grant of a fair or market, with an express grant of toll, not specifying the amount, passes reasonable toll, was affirmed in error in the Exchequer Chamber. Present, The Lord Chancellor Brougham ; Lord Tenterden, C. J. ; and Tindal, C. J.,

RULES OF COURT.

HILARY TERM, 1831.

Justification of Bail.

WHEREAS by a rule of this Honorable Court made in Michaelmas term last past, it was ordered, that hereafter all special bail should be justified before a Baron at chambers, as well in term as in vacation. And, whereas it is expedient to repeal so much of the said rule as

relates to the justification of bail in term time. It is therefore ordered, That from and after the present term, the justification of bail in term time shall, unless by consent, take place as heretofore in open court, and that the justification of bail before a Baron at chambers shall be confined to cases of consent and to justification in vacation.

Days of London Sittings.

It is ordered, That from and after this present term, the sitting day at Nisi Prius at the Guildhall in and for the city of *London*, shall be the second day after every term, and that such sitting shall be adjourned until such day as the Court shall then direct. And it is further ordered, That in every notice of trial hereafter to be given for the Sittings after any term to be holden at the Guildhall aforesaid, it shall be specified whether the cause is intended to be tried on the first day of such Sittings, or at the adjournment-day, and that in every case in which such notice shall specify that the cause is to be tried at the adjournment-day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant or defendants reside above forty miles from the said City of *London*, and four days before the said first day if the defendant or defendants reside within that distance.

MEMORANDUM IN THIS COURT.

ON the 18th of *January*, 1831, The Right Hon. *John Singleton*, Baron *Lyndhurst*, of *Lyndhurst*, in the county of *Southampton*, took the oaths and his seat, as Lord Chief Baron, vice *Sir William Alexander*, resigned.

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WHITEHORNE v. SIMONE.

May 2nd.

MANNING moved for a *distringas* on an affidavit that the *venire* had been served on a servant of the defendant on 15th *April*, the return day of the writ. It also stated that on 5th *April* the deponent had gone to the defendant's house in order to serve the *venire* on him. The servant said her master was not at home. He said he should call the next day, the 6th, but did not see the defendant at that time.

Requisites of affidavit in order to obtain *distringas* where the *venire* has not been personally served.

Lord LYNDBURST, C. B. — You appointed with the servant to call again on the next day, but it does not appear that she then said that her master would be at home at that time.

BAYLEY, B. — In *Turner v. Wall*, and *Down v. Crew* (a), which arose on the stat. 51 G. 3. c. 124., then in force, and worded precisely like 7 & 8 G. 4. c. 71. s. 5., the Court of Common Pleas held that it was not sufficient to swear to belief that the party kept out of the way to avoid process, if the facts on which that belief was founded were not also stated. The judgment of the Court must be exercised on those facts. It does not in this case appear that the whole of the servant's answer respecting her master is stated in the affidavit, or that she gave him any answer implying either that he was then at home, or that he would probably be at home before the time appointed for calling again.

(a) 5 Taunt. 520. 1 Marsh. 267. S.C.

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GARROW, B.—A visit to a defendant's house might be purposely timed during hours when he is known to be absent at his daily employment.

BOLLAND, B. concurred.

Rule refused.

REPORTS OF CASES,

ARGUED AND DETERMINED IN

THE COURTS OF EXCHEQUER,

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

EDGE *against* STRAFFORD.

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ASSUMPSIT for not taking possession of furnished lodgings. — Declaration stated that, in consideration that plaintiff, at the special instance and request of defendant, would demise and let to the said defendant divers, to wit, six rooms and apartments in and part and parcel of a certain dwelling house of the said plaintiff, situate &c., for a certain term, to wit, the term of two years from the twenty-fifth day of *April* in the year 1830, at and under a certain rent, to wit, the rent of two pounds per week, to be therefore paid to the said plaintiff by the said defendant for the same, he the said defendant undertook, and then and there faithfully promised the said plaintiff to become tenant to the said plaintiff of the said rooms or apartments for the said

A verbal agreement to take ready-furnished lodgings "for two or three years," is a contract for an interest in land, and valid as a lease for not exceeding three years; but will not support an action for not entering on or occupying the demised premises.

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term of two years, and at and under the said weekly rent of 2*l.*, payable weekly, and to enter on the same as such tenant on the said 25th day of *April* in the year aforesaid; and the said plaintiff in fact saith, that he confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on, &c., at, &c., demise and let to the said defendant the said rooms and apartments for the said term of two years, and at and for the said rent of 2*l.*, payable weekly; and although the said plaintiff was afterwards, to wit, on the said 25th day of *April* in the year aforesaid, and hath always hitherto at, &c., been ready and willing to suffer and permit the said defendant to occupy and take possession of the said rooms and apartments as such tenant as aforesaid, upon the terms aforesaid, whereof the said defendant hath always there had notice, yet the said defendant, not regarding, &c., but contriving, &c., did not nor would take possession of the said premises on the said 25th day of *April* in the year aforesaid, or at any other time, or pay to the said plaintiff the sum of 2*l.* a week for the same, but hath wholly neglected and refused so to do, by means whereof the said rooms and apartments have continually, from the day and year last aforesaid hitherto, been wholly unoccupied, and have by reason thereof been out of repair and injured; and the said plaintiff, relying on the said promise and undertaking of the said defendant, paid, laid out, and expended a large sum of money, to wit, the sum of twenty pounds, in and about the fitting up and preparing the said rooms and apartments for the reception of the said defendant as such tenant as aforesaid, to wit, at, &c. — A count for use and occupation. — Plea, general issue.

The defendant's brother proposed to take the lodgings for the defendant for two or three years, or longer, at 2*l.* a week rent, saying the defendant would enter on 25th *April* 1830, and begin to pay rent from that day. On

the 26th or 27th, the defendant, who had only dealt respecting them through his brother, called and asked to see the rooms, but disapproved of their condition, and finally declined taking them. The action was commenced on the 30th.

At the last *Cheshire* assizes, before Mr. Justice *Jervis*, in August 1830, the plaintiff had a verdict for 2*l.* leave being given to enter a nonsuit, on the ground that the contract declared on for the hire of furnished lodgings was not supported by written evidence. *Inman v. Stamp* (a). A rule having been obtained accordingly in Michaelmas Term,

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John Jervis and *Lloyd* shewed cause in that term. — Nov. 29.
 The question is, Whether a contract to take ready-furnished lodgings for two years from a future day, is within section 4 of 29 C. 2. c. 3. as contended for on the other side, or within sect. 1. and the exception in sec. 2.? (b) Though in *Inman v. Stamp*, Lord *Ellenborough* held that such a contract was for an interest in land within section 4, and was therefore void, not being in writing, no reference was made at *Nisi Prius* to the

(a) 1 Stark. C. N. P. 12.

(b) 29 C. 2. c. 3. s. 1. Enacts, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of estates at will only.

Sec. 2. Except all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts, at least, of the full improved value of the thing demised.

Sec. 4. No action shall be brought—to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them—unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

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previous case of *Ryley v. Hicks* (a). There the premises were demised from a future day for a quarter, and so from quarter to quarter as long as the parties should please, and Lord *Raymond* held, after consideration, that this was not a lease at will under sect. 1., the exception in sect. 2. not being confined to leases which were to commence from the time of making, but including all leases which were not to continue for above three years from the making. There is no necessity for reading sect. 4. of the statute otherwise than with a general application. If this is to be taken as a lease in the manner most beneficial to the parties, it will be within *Rawlin v. Turner* (b), viz., for more than three years.—[*Bayley B.* The option is with the tenant (c).—] The comparative authority of *Ryley v. Hicks* and *Inman v. Stamp*, which are both *Nisi Prius* decisions, is in favour of the latter case, which must have been afterwards moved (d), *Dampier J.* having observed that, though the practice had been with *Ryley* and *Hicks*, he rather inclined to think that sect. 2., taken with sect. 4., was confined to leases executed with possession, on which two-thirds of the improved rent were reserved.—[*Bayley B.* In *Ryley v. Hicks* there were words of present demise. Mr. Justice *Dampier* might have meant that a lease for less than three years might be good, though a contract *in futuro* for a lease for less than three years would not. *Inman v. Stamp* was a contract for a demise.—] If it is a contract relating to lands within sect. 4., and not a demise, it is within sect. 4. where there is no exception. Here an “uncertain interest” is conveyed under the first section, which, as well as section 2., must in-

(a) *Strange*, 651, A.D. 1725. *Strange* for plaintiff, B. N. P. 177. S.C.

(b) Lord Raym. 736. A. D. 1699.

(c) *Dann v. Spurrier*, 7 Ves. J. 231; 2 B. & P. 399, S. C. *Doe v. Dixon*, 9 East, 15. *Price v. Dyer*, 17 Ves. jun. 363.


(d) Sel. N. P. 7th Edit. 821. 838.

clude leases made to commence *in futuro*, and is not narrowed in its terms by the exception in the latter section, or confined to leases commencing in possession from the day of the making. In *Rawlins v. Turner* (a), Lord Holt held that a lease of land for three years, to be good without deed within 29 C. 2. c. 3. sec. 1, 2., must be for three years to be computed from the time of the agreement, and not from any time after. The rent being reserved weekly, the holding must be for a week at all events, and this verdict must stand for a week's rent. — [Bayley B. It was for plaintiff to bring himself within the exception in section 2.—] The sale of a crop, when mature, has been held to be a sale of a mere personal chattel warehoused in the land (b).

In the 4th section, the words “contract or sale of lands” must be read “contract for sale of lands,” or is insensible. The legislature appears to have disposed of all cases of actual demise in section 1., unless the usual reading of section 4. is adopted.

Some evidence of taking possession was given, so as to constitute a part execution of the contract within Lord Ellenborough's dictum in *Inman v. Stamp*.

C. Temple, in support of the rule. — This is a contract respecting an interest in land, and unless it is a lease, is not within the exception in 29 C. 2. c. 3. sec. 2. that section applying to leases only. If it is not a lease, then it is either within the 1st section as an uncertain interest in land, or the 4th section as a contract of land, or an interest in or concerning it. Now, to make a lease, the term must be certain. A court of equity could not have ordered a lease to be executed for any definite period according to these terms. Then it is not a lease, but an

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(a) Lord Raym. 736. A.D. 1699.

(b) *Parker v. Staniland*, 11 East, 362. *Evans v. Roberts*, 5 B. & C. 833; and S.C. per Bayley J. as to *Emmerson v. Heelis*, 2 Taunt. 38.

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uncertain interest within section 1., and it need not be decided whether the case turns on section 1. or section 4. Section 1. applies to certain interests fixed at the time, and executed in possession: see per Lord *Ellenborough* in *Inman v. Stamp*, where the agreement was to take, which was therefore a present demise. "Part execution of the contract" are the terms used, meaning a possession by which the contract is confirmed and carried into execution at the moment of making it. The defendant repudiates the contract when he sees the rooms.—[*Bayley B.* The entry is not essential, if this agreement is a lease (a).]

Cur. adv. vult.

April 23.

BAYLEY B. now delivered the judgment of the Court (b). — The declaration in this case contains two special counts, and two counts for use and occupation. The first special count is upon an executory consideration, viz. in consideration that plaintiff would demise to defendant for a certain time, to wit, the term of two years, defendant promised to become tenant at the rent of 2*l.* a week, and it alleged, by way of performance, that the plaintiff did demise for the said term of two years, and the breach is, that the defendant did not take possession, or pay the rent.

It appeared upon the evidence that the defendant's brother, who was the defendant's agent, proposed to take the rooms, not barely for two years, but for *two or three* years, to which proposal the plaintiff acceded; and if the legal consequence of such an agreement be as it is, that defendant should be entitled to hold the premises on at will after expiration of the two years unless something was done to prevent him, and that his te-

(a) See *Bellasis v. Burbrick*, Lutwyche, 213; S. C. 1 Salk. 209.

(b) Lord *Lyndhurst* having been appointed Lord Chief Baron since the argument, gave no opinion.

nancy was not, at all events, to expire at the end of the two years, which, upon a lease for two years *simpliciter*, would be the case, the consideration for defendant's promise, as stated in the first count, is not truly set forth, and there is no averment of performance of that which really was the consideration. It is true the term alleged as the consideration for the promise is stated under a *videlicet*, but is not on that account the less material, because the allegation of performance is, that plaintiff did afterwards let to defendant for the said term of two years. The plaintiff, therefore, cannot recover upon the first count.

The second count is upon an executed consideration, in consideration that the plaintiff *had* demised, and though there is the same mistake as to the duration of the term, yet as that is upon a statement under a *videlicet*, we are disposed to think the variance on that count is not material, and must therefore see whether there is any other fatal objection to that count. That count states the defendant's promise to have been, that he would become tenant at the rent of 2*l.*, payable weekly, and to enter on the 25th *April*, assigning, as a breach, that defendant did not take possession or pay the 2*l.* a week, by means whereof the rooms had been unoccupied, and had become out of repair, and the plaintiff had laid out money in preparing them for the plaintiff's reception. This count does not state an unqualified promise to pay the 2*l.* a week, upon which the plaintiff might, perhaps, have been entitled to have sued; the defendant had never entered, and the relation of landlord and tenant had never been created; but his promise is only that he will become tenant and enter, and there is no promise to pay the 2*l.* weekly, except as that is a consequence of his becoming tenant. If, therefore, upon the evidence, the defendant never became tenant, there is nothing in the promise stated to entitle the plaintiff

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to recover any thing except damages for the breach of his promise, viz., for not becoming tenant, and for not entering. But against his recovering these damages, the 4th section of the Statute of Frauds is relied on, and the case of *Inman v. Stamp* (a) is pressed as an authority in point. The Statute of Frauds provides that no action shall be brought whereby to charge any person "upon any contract or sale of any lands," or "any interest in or concerning them," unless such contract were in writing; and in *Inman v. Stamp*, Lord *Ellenborough* ruled that a contract for letting lodgings was a contract for an interest in land, and that an action could not be maintained against a party who had refused to perform his agreement for taking them, because there was nothing to bind him but a verbal agreement.

It was supposed, upon the argument, that *Ryley v. Hicks* (b) was at variance with *Inman v. Stamp*, but I cannot see what bearing one of those cases has on the other. The only point decided in *Ryley v. Hicks* is, that a lease, though it were to commence *in futuro*, would be within the exception in the Statute of Frauds, if it did not exceed three years from the making; but I cannot perceive how that bears upon the decision in *Inman v. Stamp*. It may be said, that it is strange that the second section of the statute has made a lease for less than three years from the making valid, and yet that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee. But, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further and founded upon it a claim for damages, which might far exceed

(a) 1 Stark. N. P. C. 12.

(b) Stra. 651.

what he could claim under it in the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the Statute of Frauds. The first section of that statute provides, all leases, estates, interests of freehold, or term of years, or any uncertain interest in lands, made by livery and seisin only, or by parol and not put in writing, &c., shall have the force and effect of leases or estates at will only, and except nevertheless all leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the full improved value. The fourth section enacts, that "no action shall be brought whereby to charge the defendant upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum thereof, be in writing." Is, then, the agreement on which this action is brought, "a contract and an interest in lands?" *Inman v. Stamp* says distinctly that it is, and unless that case can be successfully impeached, it must govern the present. But can that case be successfully impeached, and is not the agreement on which this action is brought a contract of an interest in lands? The defendant, by the lease, has an *interesse termini* only; the agreement on which the action is founded is to force him to take an ulterior interest, and clothe himself with the possession. If it be said that the agreement upon which the action is brought is merely a result by operation of law from the demise, and that as that is a valid demise, what results from it must be valid also, the answer seems to be, that the fourth section takes away the right to sue upon this result, and that, though the result be not invalid, it cannot be made the foundation of an action. The effect, then, of the Statute of Frauds, as far as it applies to parol leases not

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exceeding three years from the making, is this,—that the leases are valid, and that whatever remedy can be had upon them in their character of leases, may be resorted to, but they do not confer the right to sue the lessee for damages for not taking possession (a). I am therefore of opinion the verdict cannot be supported on the second count.

This brings us to the counts for use and occupation. These counts charge the defendant for use and occupation of rooms, had, held and occupied, possessed and enjoyed, by him. Is this true as to any of the points of having, holding, &c.? Before entry by lessee, what effect has a lease upon the land? It creates an *interesse termini* in the lessee, which the lessee may grant over, but the land still remains in the lessor. A release to the lessee will not enlarge his estate, because he has nothing in the land till entry, and the whole estate is in lessor; *Litt. sec. 459. Co. Litt. 270. a.*, nor can the lessor grant over the estate by the description of the reversion, because the possession is wholly in him; *Iseham v. Morris* (b). So the lessee cannot bring trespass, because he has no possession. Upon the whole, therefore, we are of opinion, that there is no count upon which the plaintiff is entitled to recover, and consequently the rule must be made

Absolute.

(a) *Quere* if a stranger had entered on the lodgings thus demised before the lessee entered, could the latter have sued the lessor on an implied covenant for quiet enjoyment? *Roll. Abr. 520; Owen, 105. Per Fenner* in the negative; but see *Bellasis v. Burbrick*, *Salk. 209; Lutw. 213; S.C. and 2 Bac. Ab. 66. (Covenant, (B)).*

(b) *Cro. Car. 110.*

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April 16.

PITT *against* WILKS and Another.

THE plaintiff had sued out a *quo minus* against one defendant, and a *venire* against another: neither writ was bailable. The appearances and rules to declare were separate; the declaration was joint.

Where a *quo minus* had been issued against one defendant, and a *venire* against another, neither writ being bailable, Held that the plaintiff might declare jointly against both of them.

Sir William Owen moved for a rule to shew cause why the declaration should not be set aside for irregularity. The rule that the declaration should correspond with the process (a) is incompatible with issuing separate writs of varying natures against two defendants, and declaring against them jointly. This case is the converse of the practice in the Common Pleas, by which one of several defendants in a serviceable writ may be declared against singly on such writ (b).

BAYLEY B.—By the late rule in K. B. (c) the process in actions by bill must contain the names of all the defendants in that action, and may not contain the name of a defendant in any other action.

(a) Com. Dig. Pleader, (C. 13), Abatement, (G. 8.) Co. Lit. 303. a.

(b) Tidd, 9th Ed. 148.

(c) Reg. Gen. E. T. 1827, 6 B. & C. 639. Before which, the number of defendants who might be sued in one writ was confined to four, in consequence of a practice of putting in one writ a number of defendants sued for separate causes of action; in order to save the stamp duty payable on each writ. *Christie v. Walker and others*, 1 Bing. 48. That duty being repealed by 5 G. 4. c. 41., *cessante ratione cessavit lex*, the above rule was accordingly made in K. B., and an improved rule to the same effect in the Exchequer will be found *ante*, 158. In C. P. four defendants may still be joined for separate causes of action in a non-bailable writ. *Stables v. Ashley*, 1 B. & P. 50. In K. B. a plaintiff may still sue out a non-bailable writ against two defendants, and declare against one only, dropping his proceedings against the other. *Evans v. Whitehead and another*, Trin. 1828.

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Sir William Owen mentioned *Lewin v. Smith* (a).

Per Curiam.—In that case the process was bailable, and a variance existed between the affidavit to hold to bail, which was against two defendants, and the declaration, which was against one only. In this case, had both writs been of a similar kind, the appearances and rules to declare would still have been separate, but the declaration might confessedly have been joint. Nor does it make any difference that the writ against one was a *venire*, and that against the other a *quo minus*, for serviceable process is merely to bring the parties into Court, and when there they may be declared against accordingly.

Sir W. Owen did not press further for a rule (b).

(a) 4 East, 589.

(b) In *Christie v. Walker and Four others*, 1 Bingh. 68. an affidavit to hold to bail named all five defendants. A bailable *capias* issued against *Walker* only, and a serviceable *capias* against the other four. The bail-piece named *Walker* only, thus corresponding with the writ against him. The declaration was joint against all five. This variance between the writ and bail-piece and the declaration, was urged as a ground for exonerating *Walker's* bail, but ineffectually.

April 28.

COLE, Gent. one, &c. v. DYER.

A guarantee
for payment
of the debt
and costs in
an action

ASSUMPSIT.—Declaration stated, that before the making of the promise and undertaking of said defendant hereinafter next mentioned, a certain action had pending against a third person, unless paid by a certain day, was in writing, but did not stipulate for forbearance of the action. An action having been brought on the guarantee, the declaration alleged a stay of further proceedings in the first action as the consideration for the promise. Held that no such consideration appeared on the written instrument, or could necessarily be implied from it, as to satisfy the statute of frauds (29 C. 2. c. 3. s. 4.)

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been commenced and prosecuted by and at the suit of one *Richard Ridley* against one *James Ashdown*, before the Barons of His Majesty's Exchequer at, &c. for the recovery of a certain sum of money, to wit the sum of 14l. 8s. 6d. then and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, due and owing from said *James Ashdown* to said *Richard Ridley*, and which said action, at the time of making of the said promise and undertaking of said defendant hereinafter next mentioned, was depending before the barons of His Majesty's Exchequer, to wit, at, &c. whereof said defendant then and there had notice, and thereupon heretofore, to wit, on, &c. at, &c. in consideration of the premises, and that said *R. Ridley* at the special, &c. of said defendant, would cease to prosecute said action, and would stay all further proceedings therein, he said defendant undertook, &c. to pay him, the said plaintiff, the debt and full costs in said action, provided on or before Jan. 1, 1831, the sum of 11l. was not paid to him the said plaintiff at his said plaintiff's office as the attorney for said *R. Ridley*; and said plaintiff avers that said *R. Ridley* confiding, &c. did then and there cease to prosecute said action, and hath thence hitherto stayed all further proceedings therein, and that the costs of commencing said action were then and still are due and owing to said plaintiff, amounting in the whole to the sum of 4l. 18s. 4d. whereof defendant afterwards at, &c. had notice; and said plaintiff in fact saith, that said defendant did not, nor did any one on his part or behalf, pay to said plaintiff at his office, as the attorney for the said *R. Ridley* on or before the said 1st Jan. 1831, the said sum of 11l. to wit, at, &c. and although the said 1st Jan. 1831, hath long since elapsed; yet said defendant not regarding, &c. hath not as yet paid the debt and full costs of commencing and prosecuting the afore-

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said action or any part thereof, amounting in the whole to 19*l.* 6*s.* 10*d.* although said defendant afterwards and after the said 1st *Jan.* in the year last aforesaid, at, &c. was requested by said plaintiff so to do.—Common breach. Money counts, and account stated.

Pleas : 1st, General issue : 2nd, As to the supposed cause of action in the 1st count, that the said supposed promise in the said 1st count of said declaration mentioned, was a special promise for the payment of the debt of another person, to wit, of the said *James Ashdown*, and that no agreement in respect of the said supposed cause of action in said 1st count of said declaration mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shewn, was in writing, or signed by the said defendant or by any other person by him thereunto lawfully authorized. (Verification.)

Replication to 2nd plea, that said promise in said 1st count of said declaration mentioned, was a special promise for the payment of the debt of another person, to wit, *J. Ashdown*, and that an agreement in respect of said cause of action in said 1st count of said declaration mentioned, or memorandum or note thereof wherein the consideration for the said special promise is stated and shewn, was in writing, and was signed by the said defendant. (Concluding to the country.)

The action of *Ridley v. Ashdown* proceeded to declaration, when *Dyer*, the defendant in this action, called on the attorney for *Ridley* and offered to compound for the debt and to pay the full costs, on condition of all proceedings being stayed. The following guarantee was ultimately given, entitled in the Exchequer of Pleas in the cause of *Ridley v. Ashdown*.

“ We the undersigned do hereby jointly and severally submit, undertake, and agree to pay *G. C. Cole*, Gent.

the debt and full costs in this action, provided on or before the 1st day of Jan. 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him the said *G. C. Cole*, at his office, as the attorney for the plaintiff.

Dated 6 Nov. 1830.

James Ashdown (Deft.)

Debt £6 11*s.* 11*d.*

John Dyer."

Costs 4 18*s.* 4*d.*

£11 10*s.* 3*d.*

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At the trial before *Lord Lyndhurst* at the Sittings after Hilary Term, the plaintiff was nonsuited. A rule *nisi* having been obtained for a new trial on a ground which afterwards became immaterial,

C. Creswell shewed cause.—The plaintiff is not entitled to recover on the agreement. No sufficient consideration appears on the face of it, nor any stipulation to stay *Ridley's* further proceedings in the action. Supposing a consideration to have been stated, no sum is fixed to be paid, and parol evidence of the amount of the debt and costs in *Ridley v. Ashdown* would not be admissible to supply the defect in the written agreement. *Wain v. Warlters.*(a) No consideration being stated in writing, there is no agreement or specialty in the promise stated on the face of the written agreement so as to satisfy the words "agreement" or "special promise" in 29 C. 2. c. 3. s. 4. *Saunders v. Wakefield.*(b) The question might have been more properly raised on demurrer, had the whole agreement been set out in the declaration. The plea is the same as in *Saunders v. Wakefield*, which confirms *Wain v. Warlters*.

(a) 5 East. 10.

(b) 4 B. & A. 595. Tr. 1821. See *Jenkins v. Reynolds*, 3 Br. & B. 14. *Morley v. Boothby*, 3 Bingh. 107. *Whitcomb v. Lees*, 5 Bing. 34. S. P. All decided since *Saunders v. Wakefield*.

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M. Chambers contra.—If a sufficient consideration can be collected from the whole of the agreement by fair and necessary implication, the promise is within the statute. Now the suspending the action is here in fact a staying it, viz. between the date of the agreement 6th Nov. 1830 and the 1st Jan. 1831.—[*Lord Lyndhurst*, C. B. Does the consideration stated in the declaration so necessarily arise from the agreement produced as to exclude the supposition of any other consideration?]
In *Russell v. Moseley* (a) a past consideration might have been implied for the promise as well as the future consideration there alleged and established. So in *Ryde v. Curtis* (b) though the consideration declared on was adjudged to appear sufficiently on the face of the instrument, that was not the only consideration which might have been collected from it. *Newbury v. Armstrong* (c) affords a similar observation. All these cases have occurred since *Saunders v. Wakefield*.

LORD LYNDHURST, C. B.—The declaration alleges that in consideration that *Ridley* would cease to prosecute his action against *Ashdown*, and would stay all further proceedings thereon, the defendant promised the plaintiff to pay him the debt and full costs in that action. Both the consideration and the promise must be shewn on the face of the written instrument. Then, if the consideration here alleged is such as must necessarily be implied as the effect of the instrument, it must be also the consideration to be collected from its terms. But in this case various conjectures may be made as to the real consideration for the guarantee here proved. And if two interpretations can have place on the subject no sufficient consideration appears to sustain this action.

(a) 3 Br. & B. 211.

(b) 8 D. & R. 62.

(c) 6 Bing. 201.

BAYLEY, B.—I cannot distinguish this case in substance from *Saunders v. Wakefield*, where this question was argued on demurrer, the agreement having been set out in the replication. The consideration alleged in the declaration to result from the agreement is, that *Ridley* would cease to prosecute the action and stay all further proceedings, which amounts to an undertaking on his part to drop that suit. But is any thing to be found in the agreement stipulating for his forbearance of the suit? And if any other agreement can be supposed to have existed, the consideration stated in this declaration cannot necessarily be implied. Now there might have been a distinct agreement with *Ashdown* by which the present plaintiff was to wait for payment by him till the 1st *January*, and afterwards for some benefit conferred by *Ashdown* on this defendant, he undertook by this agreement to pay the plaintiff on the 1st *January* if *Ashdown* did not. The actual consideration is not sufficiently expressed in the written memorandum.

GARROW and BOLLAND, Bs. concurred.

Rule discharged.

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SMITH *against* ANN POCKLINGTON and HENRY SHARP
POCKLINGTON.

COVENANT. By indenture of lease dated 31st *March* 1827, between the defendant *A. Pocklington* (mortgagee in fee of the demised premises) of the first Where mortgagor and mortgagee join in a lease containing an express covenant by mortgagor only, for quiet enjoyment, no covenant by both for quiet enjoyment can be implied.

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part, the defendant, *H. S. Pocklington* (mortgagor), of the second part, *J. Jenkins* (a trustee), of the third part, and the plaintiff (lessee) of the fourth part, "the said *A. Pocklington* at the request and by the direction of *H. S. Pocklington* did demise and lease" a piece of ground therein described with liberty to make roads therein for carriage of coals, &c. and to erect, build, and make wharfs or quays on the ground so demised, in, at or near the side or bank of the river *Tawe*, for the shipping of the said coals, &c. A yearly rent was reserved, also a royalty of 1s. for every wey of coal, &c. which in each year should exceed 2000 and should be conveyed in, upon, or over the said demised premises, and shipped by the said plaintiff.

Averment that at the time of making the said indenture the defendants and the said *John Jenkins* had not in themselves, or in any or either of them or was there in any or either of them good right, full power, and lawful and absolute authority to demise and lease to the said plaintiff full and free liberty, power and authority to and for the said plaintiff, his executors, administrators and assigns, to erect, build, and make any wharf or wharfs, quay or quays, upon the said ground by the said indenture demised in, at, or near the side or bank of the river *Tawe* for the shipping of the said coal, &c. for that the said defendant *Ann*, at the request and by the direction of the said defendant *Henry S. P.* and *George Haynes*, at the request as well of the said defendant *H. S. P.*, as of the said defendant *Anne P.* and also the said *Henry S. P.*, on 9th May 1825, at &c. did by a certain indenture bearing date the day and year last aforesaid, and which being in the possession of the said defendants or their lessee therein named, the said plaintiff cannot produce the same to the court here, demise and lease a certain part of the said tenement with the appurtenances by the said indenture demised and leased to the said plaintiff, that

is to say, the use in common with the said *Henry S. P.* his tenants or lessees of the dock or layer for vessels, unto *W. Meager* for a certain term then to come and unexpired, and from thence until the date of the said indenture, and from thence hitherto subsisting; by virtue of which said demise so made to him the said *W. Meager* as aforesaid, he the said *W. Meager*, having entered into the said part of the said demised premises, by lawful right and title, hath from the time of making the said indenture, and from thence hitherto, to wit, at, &c. having during all the time aforesaid, lawful right and title, lawfully hindered and prevented the said plaintiff from filling or otherwise using the said part of the said demised premises, that is to say, the said dock or layer for vessels, by means of which said several premises the plaintiff hath wholly lost and been deprived of all the rents, profits and benefits of the said part of the said demised premises, amounting to the sum of £. and has been wholly prevented from building any shipping place or other erection on the said demised premises or otherwise using the same, and from carrying weys over the said part of the said premises. Damage 1000*l.*

Pleas: 1st, *Non est factum.*

2nd, That the defendant and *John Jenkins* had in themselves good right, full power, and lawful and absolute authority to demise and lease unto the said plaintiff full and free liberty, power and authority to and for the said plaintiff, his executors, &c. to erect, build, and make any wharf or wharfs, quay or quays, upon the said ground by the said indenture in the said declaration first above mentioned, in, at or near the side or bank of the river *Tawe* for the shipping of the said coal, &c.

3rd, That the said defendant *A. P.* at the request and by the direction of the said defendant *H. S. P.* and

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the said *George Haynes* at the request as well of the said defendant *H. S. P.* as of the said defendant *A. P.*, and also the said *H. S. P.* did not demise nor lease any part of the said tenements with the appurtenants by the said indenture in the said declaration firstly above mentioned, demised and leased to the said plaintiff to the said *W. M.*

4th, That the said dock or layer for vessels in the said declaration mentioned, and thereby alleged to have been demised and leased to one *W. Meager* the younger, in manner and form as therein is mentioned, was not part of the tenements with the appurtenants, by the said indenture of lease in the said declaration firstly above mentioned, demised and leased to the said plaintiff.

At the trial before *Bolland, B.* at the last Glamorganshire Lent assizes, it was proved that the ground demised to the plaintiff abutted on the river *Tawe*, near Swansea, and was delineated on a plan annexed to the plaintiff's lease. The plaintiff was, however, prevented from making a wharf for shipping coals, as contemplated by the lease on account of a prior demise by the defendants to *Meager*, of a dock between high and low water mark, covering nearly all the frontage of the land demised to the plaintiff. The lease to the plaintiff contained a covenant for quiet enjoyment by the defendant *H. S. Pocklington only* against any let, interruption, &c. "of *A. Pocklington* or *H. S. Pocklington*, or either of them, or of or by any other person now or hereafter lawfully or equitably claiming or to claim any estate, right, title, trust or interest in the said premises by, from, under or through them, or either of them," &c. The plaintiff was nonsuited.

Whitcomb now moved to set aside the nonsuit and for a new trial. But

Per Curiam. This action is brought against a mortgagor and mortgagee on a covenant for quiet enjoyment supposed to be implied against them both from the demise of certain premises to which they are parties. But the express covenant for quiet enjoyment is by the mortgagor only, (a) and neither the lease, lessors, or covenant appear to be joint; on the contrary, the demise must be taken to be a separate lease from each of the defendants. A joint covenant for quiet enjoyment cannot be implied against this mortgagor and mortgagee, for if the mortgage money was paid off, the covenant would remain in force against the mortgagor.

Rule refused. (b)

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(a) In *Coleman v Sherwin*, 1 Salk. 137. Carth. 97. S.C. The demise was by two without any express covenant for quiet enjoyment. The Court held that there being no express covenant, the action was founded on the covenant in law implied in the word *dimiserunt*; the interest granted by which word being joint, the covenant imported by it was joint also. The action was brought on the implied covenant arising in law from the words in the lease, *demise* by the mortgagee, and *grant and demise* by the mortgagor (*Spencer's case*, 5 Co. 17. a.); but the express covenant by mortgagor only, that the plaintiff as lessee should enjoy during the term without let, interruption, &c. qualified the generality of the covenant in law, restraining it by the mutual consent of both parties, so that it should not extend farther than the express covenant. *Nokes's case*, 4 Co. 80. 2nd vol. last Ed. 482. note. See *Cro. Eliz.* 674. 864. *Yelverton* 175. Where a mortgagor and mortgagee joined in a lease, but the lessee's covenants to pay rent and repair were with mortgagor and his assigns only, the assignee of the mortgagee cannot sue on those covenants because collateral to his interest in the land, and not running with it because not made with the mortgagee in whom was the legal estate. *Webb v. Russell*, 3 T. R. 393. Yet the mortgagor might sue thereon as covenants in gross, even after his own as well as mortgagee's interest determined. *Stokes v. Russell*, 3 T. R. 678. S.C. in *Erfer*. 1 H. Bl. 562.

(b) Joint words in a covenant are to be taken respectively and severally in respect of the several interests of the grantors. *Windham's case*, 5 Co. 7. b. (See *Tyrwhitt's Analytical Index to Coke's Reports*, tit. *Covenants*, p. 61.), and where the interests of several parties to a deed, though of the same part, are several, the deed may be cancelled as to one only; for when the covenants are several, they are as several deeds written on the

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THOMAS WOOD AND WILLIAM GRAY v. ROBERT
CLARKE.

Moveable machines called stocking frames, sent to the house of a workman by his employer in order to work up yarn, are distrainable for rent due by the workman.

Secus, as to yarn sent by the employer to the workman's premises with the stocking frames.

Replevin for two stocking frames. Avowry for six years' rent due from *W. D.* lessee of the premises. Plea in bar that the said plaintiffs, before and at the said time, when, &c. were and still are manufacturers of hosiery, and the trade and business of a manufacturer of hosiery, then carried on, and still do carry on, within the borough of *Leicester*; and the said plaintiffs further say, that the said *W. D.* in the said avowry named before, and at the said time when &c., was and still is a stocking weaver, and the business and calling of a stocking weaver then carried on, and still does carry on, within the said borough of *L.*, of all which said premises the said defendant, at the said time, when &c., had notice; and the said plaintiffs further say, that they, the said plaintiffs, shortly before the said time, when &c., did, in the way of their said trade and business, employ the said *W. D.*, in the way of his said business and calling, as their workman, for certain wages to him in that behalf, to weave or manufacture into stockings at his dwelling-house, being the said dwelling-house in the said declaration mentioned, certain worsted yarn of the said plaintiffs, and for that purpose they, the said plaintiffs, before the said time, when &c., had delivered to the said

same piece of parchment. *Mathewson's case*, 5 Co. 23. a. *Collins v. Prosser*, 1 B. & C. 682. In the principal case the mortgagor and mortgagee were necessarily parties to the lease. (See *Patch on Mortgages*, 101.) The mortgagor, for mortgagee cannot in general demise before foreclosure (ib. 118.) and the mortgagee, for the legal estate was vested in her by the mortgage. Ib. 161.

W. D., the said worsted yarn of the said plaintiffs, together with the said stocking frames, in order that the said *W. D.* might, in his said dwelling-house, use and work the said stocking frames, for the purpose of therewith and thereby weaving or manufacturing the said worsted yarn into stockings as aforesaid, for the said plaintiffs, to be afterwards sold and disposed of by them in the way of their said trade or business, and that the said *W. D.* might, when and as soon as the said worsted yarn should be so woven and manufactured by means of the said stocking frames, return to the said plaintiffs such stockings, together with the said stocking frames: and the said *W. D.*, before the said time when &c., had and received from the said plaintiffs the said worsted yarn and the said stocking frames, for the purpose hereinbefore mentioned, in that behalf, and at the said time when &c., he, the said *W. D.*, had and retained in his said dwelling-house the said worsted yarn and the said stocking frames, for the purpose hereinbefore-mentioned in that behalf, and the said worsted yarn and the said stocking frames, at the said time when &c., were remaining and being in the said dwelling-house of the said *W. D.* for the purpose hereinbefore-mentioned, in that behalf, and in the way of the said plaintiffs' said trade or business of a manufacturer of hosiery, and of the said *W. D.*'s said business and calling of a stocking weaver, and for the furtherance, advancement, and maintenance of trade and commerce, whereof the said defendant, at the said time when &c., had notice; and the said plaintiffs further in fact say, that long before, and at the said time when &c., it had been and was the usage and practice in the said trade of a manufacturer of hosiery in the said borough of *Leicester*, for manufacturers of hosiery there, in the way of their said trade and business, to deliver to their workmen, and for their workmen to have and receive from the said manufacturers, worsted yarn of the

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said manufacturers, together with stocking frames of the said manufacturers, in order that the said workmen might, in their dwelling-houses, use and work such stocking-frames, for the purpose of therewith and thereby weaving or manufacturing such worsted yarn into stockings for the said manufacturers, to be afterwards sold and disposed of by them in the way of their said trade and business, and that the said workmen might, when and as soon as such worsted yarn should be so woven and manufactured, by means of such stocking frames, return to the said manufacturers such stockings, together with the said stocking frames, whereof the said defendant, at the said time when &c., had notice. Verification.

Replication, that at the said time when &c., there were not goods or chattels, by law distrainable for rent, in the said dwelling-house in which &c., without the said stocking frames, sufficient to satisfy the said rent so due and in arrear to the said defendant, as aforesaid (a). Verification and prayer of judgment, and return of the goods. Demurrer and joinder.

Follett, for the plaintiff in replevin, supported the demurrer. The replication is no answer to the facts disclosed in the plea in bar. These stocking frames were privileged from distress, not *sub modo* as implements of trade in the hands of a tenant, but absolutely for the benefit of trade, and whether there was any other sufficient distress on the premises or not. The usage is that yarn is sent into the hands of the stocking weaver, to be worked up by him on frames sent at the same time, both yarn and frames being sent back together when done with. The ordinary instances of exemption of implements of trade from distress turn on their being in use by the tenant at the time.

(a) The replication was thus framed by suggestion of the Court, in order more satisfactorily to raise the question decided on.

Thus, *Co. Lit.* 47, valuable things shall not be distrained for rent, *for benefit and maintenance of trade*, which by consequent are for the common wealth, and are there by authority of law ; as a horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materials in the weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market. *Blackstone* (a) adopts the above, adding as a reason, for all these are protected and privileged for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers. Thus, whenever, by usage of trade, articles belonging to a third person are in the tenant's house, the landlord might presume them to belong to the third person for the benefit of trade. *Read v. Burley* (b) affords illustrations of the cases put by the text writers. There, the taking so much yarn and a horse was avowed for rent arrear. Plaintiff in his plea in bar, alleged that he was a cloth worker, and delivered certain wool to be spun, and the cloth workers used to take back their yarn by weight, and because there were no weights there, he sent to the next village for them ; and in the mean time avowant distrained the yarn, being on his shoulders, and the horse which he had there to carry the yarn, for rent arrear. Demurrer by avowant. *Walmsley, Beamond, and Owen, Js. absente Anderson*, held that this yarn, being on plaintiff's shoulders, could no more be distrained than a net in a man's hand, (6 R. 2.) or a horse whereon a man rides, or which is in his hand. *Walmsley*, however, held the horse to be distrainable, because being on private premises, not a hostry, or a common weighing place, with consent of the owner. *Beamond and Owen*, contra, for the trade of the cloth workers is necessary,

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(a) 3 Comm. 8.

(b) Cro. El. 549, 596 ; Ney's R. 66. S. C.

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and to be favoured, and this horse is not to be distrained any more than a horse which carries corn to market, and is put into a friend's house for the time, which is not distrainable (which *Walmsley* denied). They further said that where a horse carries corn to a mill, and is tied at the mill doors, during the grinding of the corn, he shall not be distrained, which *Walmsley* agreed, because it is a commonplace and for the public weal, but they be not alike. *Anderson* was present at another hearing of the same case, again stated in the same book, p. 596, thus, "A clothier sent certain wool to a spinner to spin, and afterwards comes with a horse to bring back the yarn, and because there were not any beam or weights in the spinner's house to weigh it, the clothier and spinner by the leave of one of the neighbours, who had a beam and weights in his house, brought his horse thither and entered therein to weigh the said yarn, and whilst they were there, the landlord of the house distrained that horse and yarn for his services, and whether the taking hereof by distress be lawful or not was the question on demurrer. *Anderson*, *Beamond*, and *Owen*, J.s. held them not distrainable. For the trade of a clothier is *pro bono publico*, who ought to be allowed all necessary means, and without doubt, cloth put to a weaver to be woven, nor yarn in a house to be spun, are not distrainable, (which *Walmsley* agreed) and weighing is as necessary as the former; wherefore the yarn brought there for that purpose, and the horse which brought it, are privileged and not distrainable; and although, as it hath been said, (*semb.* by *Walmsley* J. ante) "If the weighing had been in a public house for that purpose they had not been there distrainable, for it is a place privileged for those purposes, as a farrier or taylor's shop, but being now brought to a private house for that purpose it is not so (privileged);" he (*semb.* *Anderson* J.) said "That the cause of the bringing privilegeeth them as an horse

which carrieth corn to a market, and is set up for a time in a private house is not distrainable as *Beaumont* said, because his purpose of bringing the horse was *pro bono publico*. *Owen* also held that they were not distrainable for another reason, for that they always were in the possession of him who brought them, as it is of a horse whereupon one rides. *Walmsley* contra, because it is not averred that it was a common beam or place for weighing, for there is a difference between a common place and a private house. It was afterwards adjudged that the distress was not lawful. That case shews that if chattels necessary to the carrying on trade are on the premises, they are privileged from distress for rent. It appears here, that the frames and yarn were delivered together to the weaver at his house for the sole purpose of his working up the yarn on the frames, for the purposes of the plaintiff's trade, and in order that the frames might be returned with the yarn when made into stockings for the plaintiff. Notice of this fact to the defendant is averred in the plea, as also that it is the usage of hosiery manufacturers in Leicester. If the yarn is clearly privileged as being there for the sole profit and benefit of trade, the implement must be also privileged for the same reason. In *Gisborne v. Hurst* (a), the distress was on cheese carried for plaintiff by a person not a common carrier, and placed by him on his arrival at home, in the barn of a private house. The Court agreed that goods delivered to any person exercising a public trade or employ, to be carried, *wrought or managed* in the way of his trade, are for that time under a legal protection, and privileged from distress for rent; and the carrier was held a common carrier for the purpose of this privilege, which is not that of the carrier, but that of the trader. *Gilman v. Elton* (b) decided that

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goods merely deposited in the hands of a factor cannot be distrained by his landlord for arrears of the factor's rent. *Burrough J.* there states, that in none of the cases has any particular description of trade been specified, but the principle adopted has been, that where goods are sent to a third person for any specified purpose, they are during that time privileged from distress for the advantage of trade in general. In the same case *Richardson J.* states this exception to the landlord's general right to distrain, thus; that where the goods of one man are put into the hands of another, to be "wrought, manufactured, or managed," in the way of his trade, they are for that time protected from distress. That rule he says is not necessarily limited to cases where the goods are to be operated on, and he cites *Gisborne v. Hurst*, as a case where it was applied to goods delivered to a person exercising a trade of a carrier for the purpose of conveyance only. Here the stocking frames were on the premises, for the purposes of the plaintiff's trade, and the usage being as alleged, any decision that they are distrainable would tend to narrow this trade in general. In the later case of *Thompson v. Mashiter (a)*, goods deposited by the consignee, a factor in a water-side warehouse, till they could be sold, were held privileged from distress for rent of the warehouse. *Park J.* relies on *Gisborne v. Hurst*, both as to the facts and the rule laid down by *Holt C. J.* *Mathias v. Mesnard (b)*, supports the same point. The privilege here claimed is absolute, but *Simpson v. Hartopp (c)*, and *Gorton v. Faulkner (d)*, are cases where the articles were held privileged as implements of trade, and therefore *sub modo* only where there is no other sufficient distress. In *Simpson v. Hartopp*, the facts wholly differ from the present, for the

(a) 1 Bing. 283.

(b) 3 C. & P. 353.

(c) Willea, 512.

(d) 4 T. R. 565.

stocking frame was hired by the tenant at a weekly rent, and might be used at pleasure for his own trade without the obligation to return it, which here exists. The plea did not raise the question of general exemption for benefit of trade, and the judgment against the distress turns on the other ground, of the frame being in use at the time. This point formed no ingredient in the judgment, but the C. J. recognizes the absolute privilege here claimed in favor of trade.—[*Bayley* B. The plaintiff there not being in possession, could not have brought trespass.—] *Gorton v. Falkner* has no application there. It does not shew that goods sent to a trader's house for the purposes of trade are not privileged. The loom was not there sent by the plaintiff for the purpose of weaving particular yarn, but was lent, so that other persons' work might be done on it; and the custom of Manchester for loan of frames in some instances, and hire of them in others, entirely varies from the custom here alleged. The loom was there held distrainable, because not stated to be in actual use at the time, and the privilege being claimed, not as that of the trader as here argued, but as that of the tenant, to whom the looms were lent, no other sufficient distress being on the premises. Here the frames and yarn are sent to be "wrought and managed" together for the benefit of the owner only to whom they are to be returned when done with, which is a stronger case than that where the horse which brought goods to the shop was held privileged (a). Though Mr. Serjt. *Heywood* argues the case on both views, viz. whether the looms are considered the property of the tenant himself, or of the lender, the latter point is passed over in the judgment, which goes on the other alleged ground of privilege from distress *sub modo*,

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viz. that the looms being implements of the *tenant's* trade, and not being stated to be in use at the time, were distrainable, it not appearing that there was any other sufficient distress on the premises. In neither case were the frames sent for a specified purpose of manufacturing goods, as here where the tenant has no control of them except for that purpose. In *Simpson v. Hartopp* it did not appear that the weaver had been employed by the plaintiff to manufacture with the frame the commodities of the plaintiff. The tenant there had a right to the exclusive use of the frame, by the terms of the letting. In *Gorton v. Falkner*, it does not appear but that the raw material was furnished by the lessee of the loom, who then was more a manufacturer himself than a mere labourer, as here. In *Francis v. Wyatt*(a) the question of exemption in favor of trade, did not arise.

Chilton contra, for the avowant. — The replication is a sufficient answer to the plea in bar : for these frames, which on the premises were not absolutely privileged from distress for rent in arrear, by the fact of their having been delivered to the tenant for the single purpose of weaving stockings for and on behalf of the plaintiffs. In *Gorton v. Falkner*, Lord Kenyon. lays down as a general proposition, that at this time, all moveable articles are distrainable. Nor could that judgment have been given in support of the distress, had the absolute privilege here claimed in favour of trade, been considered to exist. *Buller J.* in that case says, Whether goods be the property of a stranger or a tenant is perfectly immaterial, provided they are on the premises and are not privileged by law from distress. *Gilbert C. B.*(b) adopts the rule before cited from *Co. Lit.* 47., and the

(a) 3 Barr. 1498.

(b) Law of Distresses, 33. 4th Edit.

same instances are repeated in *Rolle's* and *Viner's Abridgments*, tit. *Distress*. Cases in which privilege from distress is claimed, must be *ejusdem generis* with the instances put by those text writers, and by Lord *Holt*, in *Gisborne v. Hurst* (a). *Blackstone* (b), in stating the instances of privilege from distress put in *Co. Lit.* 47., of a horse standing at a smith's shop, or in a common inn, cloth at a tailor's, corn sent to mill or market, adds, "For all these are protected and privileged for the benefit of trade, and are supposed in common presumption, not to belong to the owner of the house, but to his customers." The terms of the rule laid down by Lord *Holt* in *Gisborne v. Hurst* shew, that this being a private undertaking, required further consideration." [Lord *Lyndhurst* C. B.—The court there states the case of *Read v. Burley* (c) to be a stronger case than that before them.] Whatever the *obiter dicta* were in *Read v. Burley*, that decision could not have been what Lord *Holt* in *Salkeld* supposes it to have been, if the plea in bar is correctly reported in *Cro. El.* 549. For there the purposes of trade were not completed till the yarn was weighed. It was at the cloth worker's being operated upon, or "managed" within the rule cited from *Salkeld* on the other side. From the report in *Noy* (d), it seems the possession by the owner of the yarn and horse, was relied on by the court against their being distrained; and in *Cro. Eliz.* 550. *Walmsley* J. denied the privilege from distress of a horse put in a private stable. [Lord *Lyndhurst* C. B. The statement of *Read v. Burley*, in *Cro. El.* 549. is reconcileable with that in p. 596., and it consistent with the plea in bar. The yarn might have been on the shoulders of its owner on the premises where the weights were. Taking the two statements together,

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(a) *Salk.* 249.(b) 3 *Comm.* 8.(c) *Cro. Eliz.* 596.(d) See *Noy's Rep.* 68.

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that in p. 596. being express, and the other admitting of a similar construction, we must take the distress to have happened, not on the premises of the workman, but of a neighbour where the weights were. (a)]—It is not to be presumed that the tools wherewith a man earns his livelihood at a trade, are not his own. (b) And it is just as beneficial to trade that he should have tools of his own, as that he should work with his master's.—[*Lord Lyndhurst* C. B. *Lord Holt* in *Salkeld* says, that the privilege is that of the trader who sends the goods, not of the bailee.] The privilege will operate as much in favour of trade if it exists in favour of the bailee being a tenant, as if it should only be applied to the benefit of the party sending the goods to him to work on. Nor is it material whether the bailor is a trader or not. The plea discloses the bailee to be a workman, but supposing the bailor not to have been a trader, the yarn would have been privileged; but then frames, or any other article sent with it for use upon it would not. All the qualities put by *Lord Holt*, and *C. J. Willes*, of being “carried, wrought, worked up, and managed,” (c) should concur to give this privilege; but neither of those terms includes stocking-frames. It is of no public importance whether the stocking-frame belongs to the master or the workman, or is hired by, or lent to the latter. If the machine were his own, the workmen would probably earn more wages.—[*Vaughan* B. It may be a matter of public concern whether this work must be carried on in large factories, or at the homes of the workmen.] No necessity for the usage stated appears, but *Gilman v. Elton*, *Thompson v. Mashiter*, and *Mathias v. Mesnard*, cited on the other side, turn on the necessity that the dealings between tradesmen and cus-

(a) And see the case stated by *Lutwyck J.*, 3 Lev. 261; *Lutw.* 1161. S.C.

(b) See the instances, 3 Bla. C. 9.

(c) *Salk.* 250; *Willes*, 514.

tomers should be carried on in a particular course, and in the recognised character of tradesmen. In *Simpson v. Hartopp* the *dictum* is, that a stocking-frame can only be privileged as an implement of trade.—[*Bayley B.* There the frame-owner let it to a lessee without the existence of the relation of workman and employer.]—In this case, as well as *Gorton v. Falkner*, nothing being paid for the use of the looms, the frame-owner might have them back at pleasure. The law now leans to extension of power of distress; and by statute sheaves of corn and growing crops may be distrained. 22 E. 4. 50. shows that a saddle severed from a horse standing at a smith's shop to be shod, may be distrained (a). In *Powkes v. Joyce* (b), cattle, on their road to London, put into a field at *Barnet* for a night, were held distrainable by the landlord. The relief there granted in chancery would now be granted at law, fraud being the ground for relief, *Tate v. Glead* (c).—[*Bayley B.* The ground of public inconvenience also exists.]—*Juson v. Dixon* (d) recognizes the landlord's right to seize any goods on the demised premises, and establishes a similar right in a collector of assessed taxes.—[*Bayley B.* The latter has often a right of seizure by statute, where no common law right to distrain exists.]

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Follett in reply.—It is sufficient if the principle deducible from the instances put in *Co. Lit.* applies. Though the articles distrained are implements of trade having a peculiar protection, where there is another sufficient distress on the premises, they have also a general privilege from distress for the benefit of trade. That privilege is alike claimed in this case, whether the

(a) Vin. Ab. Distress (I).

(b) 3 Lev. 261; S. C. 2 Vent. 50; Lutw. 1101.

(c) See 2 Christian's Bla. Com. 8. n. (4); 2 Saund. 290. n.

(d) 1 M. & S. 601.

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tenant or the owner of the distress is the trader. In the case in *Cro. Eliz.*, the distress was at the house of a private individual, and the cause of the bringing privileged it.—[*Bayley B.* The horse was not there to be left for any time on the premises, or to use or occupy them. Can the employer's privilege be carried further than the article sent to be operated on?—] The exemption on the ground of public utility is not necessarily limited to articles sent to be operated on, but extends to factors who are merely the depositaries of goods, and to carriers, who are only entrusted with them for the purpose of transport. (a) A horse would be protected which, after carrying yarn to a loom, remained there during the *bonâ fide* weaving of the yarn, whatever time that process might occupy. Then, if the stocking frames were taken by the horse in the same way, why should not the former be protected as well as the latter for the benefit of trade? The usage of trade is distinctly stated, and this calling is as much a trade as that of a blacksmith. The judgment in *Gorton v. Falkner* does not turn on this point.

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LORD LYNTHURST C. B. now delivered the judgment of the Court.—This case does not turn on the privilege of a workman in respect of the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. The plaintiffs, who were the employers, furnished the workman not only with the materials upon which he was to work, but also with the machinery by which the materials were to be worked up. The question is as to the extent of the employer's privilege, whether it is confined to the materials which he supplies, or applies also to the machinery by which the working up is effected. It appears to us, that it is confined to the

(a) See per *Richardson J.* 6 B. M. 257.

materials, and does not include the machinery. The instances put in the books as to this head of privilege, apply to the materials only, and not to the machinery. *Coke*, in his Commentaries upon *Littleton*, sect. 47 a., in enumerating the things which are exempted from distress, mentions among others, materials in a weaver's shop for the making of cloth, and is wholly silent as to the machinery by which the cloth is to be made. It cannot be said that under the term materials, machinery would be included. In *Read v. Burley* (a), the question was confined to the wool, the material which was spun, and the horse by which it was carried. In *Gisborne v. Hurst* (b), which was considered in the argument as laying down the correct rule, things included under this head of privilege, are said to be "goods delivered to a person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employment." In *Simpson v. Harropp* (c), the C. J. evidently adopts this rule, saying, "the second head of general exemption is, things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." In 22 *Ed. 4.* 49., where this privilege is mentioned, the instance put is the robe which a man sends to a tailor to make. So *Brooke's Abridgment*, tit. *Distress*, pl. 42. and pl. 281., mentions "horses at an inn, cloth at a tailor's, grain at a mill, *et hujusmodi*, which are there by authority and for the common weal." So again *Gilbert on Distresses*, 35., says "Valuable things in the way of trade shall not be liable to a distress, as a horse standing in a smith's shop to be shod, or in a common inn, or cloth sent to a tailor's shop, or corn sent to a mill or market, for all these are privileged and protected for the benefit of trade, and are supposed in com-

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(a) Cro. El. 549, 596.

(b) Salk. 249.

(c) Willes, 34.

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mon presumption not to belong to the owner of the house, but to his customers." This passage is adopted by *Blackstone* (a), who may therefore be considered as affirming it, but gives no additional instances under this head. In *Gilman v. Elton* (b), where the question was, how far the goods of a principal were privileged from distress for his factor's debt, though the instances of materials sent to a weaver, and cloth to a tailor are mentioned, and the rule in *Gisborne v. Hurst* and *Simpson v. Hartopp* is approved, there is nothing to carry this head of privilege beyond the materials and the means of transporting them; there is nothing to extend it to the machinery by which the materials are wrought. The same may be said as to *Thompson v. Mashiter* (c), where goods sent to a factor for sale were held privileged in the warehouse of the wharfinger, where the factor had deposited them till an opportunity for selling them should offer. None of these cases go beyond this, that the material to be worked up is privileged; that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the hands of a carrier whilst he is carrying it; in the hands of a factor to whom it is consigned; and in the hands and warehouse of a wharfinger where it is lodged and deposited by the factor.

There is no case or dictum, that the machinery by which it is to be manufactured is included in the privilege. The only colour for including it seems to arise from the use of the word "managed" in *Gisborne v. Hurst*, but that appears to apply only to the management of the material in its original or wrought state, and to the machinery or engine by which it is wrought. The case of *Gorton v. Falkner* comes so near to the present, and differs from it by such minute points of

(a) 3 Comm. 8.

(b) 3 Brod. & B. 75.

(c) 1 Bing. 283.

distinction, that it is a strong authority to shew that the privilege is confined to the material, and that it has been the common understanding that it did not extend under any circumstances to the machinery. It might have been said in *Simpson v. Hartopp*, that it was for the benefit of trade and commerce that the owner of a loom who let it to a workman should have the privilege of having it protected from distress, and as that action was brought by the owner of the loom, it is probable that this privilege would have been insisted on had it been thought tenable. That case is important, because it shews an inclination at that distance of time to clothe the machinery with a general and unqualified protection; and yet, from that period to the present, it is singular that the course pursued in this case, so obvious and simple if available, should never have been adopted. *Gorton v. Falkner* improved upon the attempt made in *Simpson v. Hartopp*. The loom was lent, but not let; it was not lent for any definite time; so that the owner might resume it when he thought proper, and it was only to be used for the owner. The sole difference between that case and the present is, that there the loan was general, and not for a particular transaction, and that it is not there expressly stated that the owner of the loom was to find materials. But neither of these circumstances appears to us to make any material distinction. It was there stated, that it was customary at Manchester, the place where the looms were distrained, for the employer to lend his workman looms without receiving any thing for the use of them, except they were used in weaving worsted tapes; but, if benefit of trade be the criterion, the loan is equally for the benefit of trade whether the looms are applied to the materials of the employer, or to the materials of the workman, or of any other person, and there cannot, as applied to this subject, be any real dis-

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inction between the use of the loom whilst a supply of materials furnished with it is worked up, and the use of it whilst the owner's pleasure shall continue. If the privilege is to continue till the supply of materials furnished with the loom is exhausted, it will depend on the extent of that supply how long the privilege will continue. The supply may be sufficiently large to keep the loom employed for a whole year, or more; and what is the case as to one loom, and the privilege attending it, may be the case as to as many looms as the place in which they are worked may be capable of holding, and the remedy by distress for rent for the use of the premises may be entirely suspended by the exclusive use of the premises for privileged articles. Although this may also be the case where the privilege is clear, and its extent ascertained, we consider it not an immaterial consideration, when the extent of the privilege is the point to be determined. We think, therefore, the privilege from distress for rent does not extend to the machinery of the employer, because there is no decision, or dictum that such a privilege exists, and because it is not necessary for the protection of trade that it should exist. Upon that principle, it would equally extend to any machinery lent, though not lent by the employer, and to which it has been decided that it does not extend, and because the whole premises out of which the rent issued might be exclusively occupied and entirely filled by the machinery for which the privilege is claimed.

Judgment for the avowant.

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POOLEY, Assignee of SYER, a Bankrupt, *against*
MILLARD.

TROVER. Notice of disputing the petitioning creditor's debt. At the trial before *Gaselee J.* at the last *Norfolk* assizes, it appeared that *Syer's* commission was dated 7th of *Sept.* 1828, and that he was declared a bankrupt on the 17th of *Sept.* The plaintiff was the petitioning creditor, and had sold goods to the bankrupt, for which two bills had been given. The solicitor to the commission proved, that at the first private meeting a bill of exchange for 56*l.* drawn by plaintiff on, and accepted by *Syer*, was produced before the commissioners in proof of a debt due from *Syer* to the plaintiff. Another similar bill for 70*l.* was produced to and examined by the commissioners at the same meeting. After the plaintiff had left the room it was seen on the table at which the commissioners sat. The room was afterwards searched for it, as was the plaintiff's house, without success. The plaintiff having indorsed this bill to the witness in *July*, on the 4th of *Sept.* *Syer* committed an act of bankruptcy. On the 5th of *Sept.* the bill was returned to the witness by his banker. He struck out his indorsement, and gave the bill back to the plaintiff, who paid him the amount on the same day. One of the commissioners proved that both bills were produced before them; that they marked both, and declared *Syer* a bankrupt on the debt so proved. Secondary evidence of the signature of the parties to the bill for 70*l.* was then admitted. It was objected at the trial, 1st. That there was no evidence of a petitioning creditor's debt to support the commission, because, though the lost bill would constitute a good debt against the bankrupt in the hands of a *bonâ fide* holder, the plaintiff could not

If a sufficient petitioning creditor's debt, (*e.g.* on two bills of exchange for 56*l.* and 70*l.*) be legally proved at a meeting of commissioners of bankrupt, who thereupon declare the acceptor a bankrupt, the subsequent loss of either bill affords no ground to impugn the commission in an action by the assignee for conversion of goods belonging to the estate.

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sue the bankrupt upon it. 2dly, That secondary evidence of a lost bill was not admissible. The plaintiff had a verdict.

B. Andrews having obtained a rule for a new trial on the above points,

Kelly, Gunning, and Palmer now shewed cause.—A sufficient petitioning creditor's debt was proved by legal evidence to exist at the date and suing forth of the commission. Then will that commission be destroyed by failing to prove that debt to exist at the time the action was brought by the assignee? If any subsequent occurrences in respect of that debt related back to the grant of the commission, so as to invalidate it, the commissioners and all persons acting under its authority would become trespassers *ab initio*. In *Ex parte Douthat* (a), it was held, that a bill drawn by the bankrupt in favour of a creditor, formed a good petitioning creditor's debt before it was due or presented for acceptance: though subsequently to the commission the bill had been duly presented and paid by the acceptors. The only question is, Was there a good petitioning creditor's debt at the time the commission issued? Stat. 6 G. 4. c. 16. s. 15. enacts that no commission shall be issued, unless the single debt of such creditor petitioning for the same shall amount to 100*l.* or upwards; but it does not impose a necessity that the bankrupt shall continue indebted, so as at all times to be liable to an action. So by section 24, the commissioners *on proof made before them* of the petitioning creditor's debt, and of the act of bankruptcy, shall *thereupon* adjudge such person bankrupt. The question is, not what debt now exists, but what then existed. There is no case to prove that

(a) 4 B. & A. 67.

a commission once good can be made bad, except by supersedeas. No one could sue the bankrupt on this bill but the plaintiff, the subsequent indorsement being struck out (a). Secondary evidence of the bill was properly admitted for a collateral purpose, after proof of the searches made. A shop debt of 170*l.* due from *Syer* to plaintiff was also proved.

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B. Andrews contra. — The evidence of the shop debt was inadmissible to support the petitioning creditor's debt, which at the trial was rested on the bills. The sale of goods, which formed the consideration for the bills, was only proved to shew the dealings between the parties and the sale to *Syer*.

Pierson v. Hutchinson (b), and *Hansard v. Robinson* (c), shew, not only that the acceptor cannot be sued on a bill lost before paid, but that secondary evidence of it cannot be given, for the acceptor, paying the bill, has a right to the possession of it for his own security. Here the bill being given for goods sold to *Syer* by the plaintiff, the loss of the bill would prevent the plaintiff from suing, either on it, or for the price of the goods. *Champion v. Terry* (d). The plaintiff, as assignee, was bound to prove the petitioning creditor's debt by the same evidence which would be necessary in an action against the bankrupt, per *Buller J.* in *Abbot v. Plumbe*. (e)

Per Curiam. — In that case the acknowledgment of the party was held inadmissible to prove the execution of his bond, for the purpose of proving a debt, without the testimony of the subscribing witness. Now a plaintiff might be able to prove the existence of a debt, though he might be unable to recover it at law; for instance,

(a) See 2 Campb. 214. n.

(b) 2 Campb. 211.

(c) 7 B. & Cr. 90.

(d) 3 Brod. & B. 295.

(e) Dougl. 216.

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in an action on a lost bill, because he could not deliver up the bill sued on. If a party sues on a bill lost since his action brought, he is shewn to be precluded by his own negligence from recovering, because the defendant was entitled to a return of the bill or an indemnity, and the plaintiff is driven to equity to recover it as a legal debt, in order that that Court may, as it can, give a good indemnity. If an instrument is lost, parol evidence is let in. Here the plaintiff has proved that at the time of suing out the commission, a legal debt existed, though such debt could not be recovered in an action at law, calling on the party to pay the debt. But in this case the plaintiff is only called on to support the commission. May not the bankrupt himself have an interest in the commission going on, in order to obtain his certificate, and should that object be defeated by the neglect of the petitioning creditor? In *Ex parte Douthat*, no claim by a third party could arise against the bankrupt, whereas here the *jus tertii* arises, for an innocent future holder might sue the bankrupt, though the petitioning creditor could not, but would be compelled to prove under the commission (a); the bankrupt perhaps might apply for a supersedeas, if indemnity was not given against such an action. Thus, though it never ceases to be a legal debt, it can only be recovered in a Court of Equity, which can decide on the sufficiency of the indemnity.

Rule discharged.

(a) 6 G. 4. c. 16. s. 8.

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CHAMBERS the Elder, *against* BERNASCONI and others.

ASSUMPSIT for money had and received. This action was brought against the defendants, to try the validity of a commission of bankrupt issued against the plaintiff on 19th *November* 1825, under which they had acted as assignees. The plaintiff and his son, bankers in *Bond-street*, stopped payment in *November* 1824. A letter of license granted to the plaintiff in that year was revoked on the 9th *November* 1825. He had been arrested in *June* 1825, at *Paddington*, but his witness deposed, that he was never arrested there, except on that occasion, and that he was not there on the 9th *November* in that year. The bail bond given in *June* described the plaintiff as of *Paddington*. The committee for investigating plaintiff's affairs had opened an office at No. 11, *South Molton-street*, to which place the plaintiff's books and papers had been taken in *November* 1824, in order to wind up the accounts of the firm. Till the letter of license was revoked, the plaintiff attended there daily. The plaintiff was arrested on 9th *November* 1825, and whether at *South Molton-street* or at his cottage at *Maida Hill, Paddington*, where his family resided, became a material question in order to the establishment of a specific act of bankruptcy, viz. keeping house, and denying himself to creditors at *Paddington*, relied on by the defendants. Witnesses were called by the plaintiff in reply to contradict the defendant's case as to this point. It was proved by the defendants that a few days after the commission issued, and before the time for surrender, the plaintiff procured an extraordinary meeting of his creditors, to get protection from arrest,

Semble, a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, sent by him immediately to the sheriff's office, and there filed in the course of business, is not evidence of the place of arrest, after the officer's death, in an action between third persons.

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and negotiated, though ineffectually, for the choice of particular creditors to be assignees (a). The younger *Chambers* obtained his certificate under the commission. In 1829 the plaintiff gave notice of disputing the commission, and petitioned the Chancellor to supersede it without success.

At the trial before Lord *Lyndhurst* C. B. at the sittings after last *Hilary* term, a trading by the plaintiff after *November* 1825, was proved by the defendants. In order to establish the act of bankruptcy by an absenter at *Paddington*, the officer who arrested the plaintiff on the 9th *November* being dead, his follower swore that that arrest took place at *Paddington*. The plaintiff, in order to establish the arrest to have been in *South Molton-street*, offered in evidence, from the files of the office of the under-sheriff of Middlesex, a paper writing, or certificate, annexed to the writ of 9th *November*, purporting to be signed by the deceased officer, *Wright*, and addressed to the under-sheriff of Middlesex, as follows :

“ 9th *November* 1825.

“ I arrested *Abraham Henry Chambers*, the elder only (b), in *South Molton-street*, at the suit of *William Brereton*.
“ *Thomas Wright*.”

The acting under-sheriff for *Middlesex* proved that, though it was sufficient for the sheriff's return, that the arrest was within his jurisdiction, except in cases of rescue, where the place of rescue was stated in the return (c), yet that, by the course of the office, the officer was required, immediately after the arrest, and before taking a bail bond, to transmit to the sheriff's office a memoran

(a) See *Like v. Howe* and another, 6 Esp. 20.

(b) The writ having been against the plaintiff and his son.

(c) *Tidd's Forms*, 5th ed. 125.

dum or certificate of the arrest, and that for the last few years an account of the place where the arrest took place, had been also required from them. On these memoranda when filed in the sheriff's office, the officer and his sureties are charged by the sheriff, in cases of escapes, rescues, &c. and returns of *cepi corpus*, &c. to writs are made thereon. The plaintiff's counsel contended that this memorandum, as made by the officer at the time, charging himself and his sureties to the sheriff, was evidence for the other purpose of proving the place of arrest. The *Lord Chief Baron* admitted the paper in evidence. It was contended for the defendants that the plaintiff was estopped from disputing his commission by his conformity thereto in the acts above detailed. The plaintiff had a verdict negating the act of bankruptcy relied on by the defendants.

Sir *James Scarlett* having obtained a rule for a new trial, on the above (among other) grounds,

Campbell, *Follett*, and *Butt*, shewed cause.—This is a written declaration of a fact made by a person since deceased, against his interest, when that fact was not in dispute, he being peculiarly cognizant of the fact in the course of his business, and is therefore admissible, though he does not thereby charge himself with the receipt of money, that being only one species of interest. Thus the declarations of deceased tenants, as to the persons of whom they hold their estates, are evidence of seisin by the latter; *Uncle v. Watson* (a). Similar declarations have been admitted to shew what was parcel of the estate held; *Davies v. Pierce* (b). Declarations

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(a) 4 Taunt. 16. See also *Doe d. Baggally v. Jones*, 1 Camp. 367. *Doe d. Human v. Petit*, 5 B. & A. 223.

(b) 2 T. R. 53. *Doe d. Johnson v. Earl Pembroke*, 11 East, 504; *Dea-*

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whereby deceased persons charge themselves with the receipt of money, are evidence to prove the surrounding circumstances, the fact of receipt itself being often immaterial. Thus, rentals in which a deceased receiver charges himself with specified sums, are evidence to shew for what particular tenure, or in what right the money was received (a). Then, whether or not it is the practice to have the place inserted in the certificates of arrest, is immaterial, for the entry is admissible, if, at the time of making it, it was against the interest of the party making it; the question being, what would have been the effect of the document at the time it was written, in furnishing evidence against the party making it; not what effect it has at the time of the action brought. In *Barry v. Bebbington* (b), on a question of soil and freehold, a steward's private book was received in evidence, containing entries of sums received by him on account of the former owner, for trespasses to the *locus in quo*. *Champneys v. Peck* (c) is a strong case where an indorsement made in the course of business, by a deceased clerk, on a copy of an attorney's bill, was admitted as evidence of the delivery of the bill. Before *Middleton v. Melton* (d) it was doubted whether a private entry, uncommunicated to the world, would affect a party making it, because as its appearing at all was not originally contemplated, it did not, therefore, necessarily militate against the party's interest. But in that case entries in a private book, kept by a tax collector, not in the course of office, but for personal convenience, were admitted against a surety, *cle v. Hancock*, 13 Price, 226; *McClell*, 51, S. C. were cited to that point. But *Bayley* B. distinguished the first as a case of pedigree, and the other as one of parochial custom, in which reputation was admissible in evidence.

- (a) *Harpur v. Brooks*, 1 Phill. Ev. ch. 7. s. 7; 3 Woodd. L. 332.
- (b) 4 T. R. 515. See *Wynn v. Tyrchitt*, 4 B. & A. 376.
- (c) 1 Stark. C. N. P. 404.
- (d) 9 B. & C. 317.

as made against his interest in acknowledging the receipt of money to which he would otherwise have a claim.—[Lord *Lyndhurst*, C. B. In *Warren d. Webb v. Grenville* (a), the debt book of a deceased attorney, containing charges for business done in suffering a recovery, which charges were marked “paid,” was admitted in evidence, and the case was recognized in *Middleton v. Melton* (b). In *Short v. Lee* (c) an entry by a deceased tithe collector, in his private book, was received to shew the collateral fact of occupation of a particular house, and not merely to shew the fact of payment. So in *Higham v. Ridgway* (d) the entry by a man-midwife, marked “paid,” having been made against the interest of the party at the time, was admitted not merely to prove the facts of payment, or attendance on the mother, but to shew the precise day of the party’s birth. By parity of reasoning, the entry would have been evidence of the place of birth, if mentioned, and material. Where a consignee of goods brings trover against a stranger, a bill of lading, consigning goods to plaintiff, would be evidence for him after the death of the master, if signed by him in the usual form, so as to charge himself with them, *Haddow v. Parry* (e). This certificate was given in the common course of business, in order to guide the sheriff, if other writs came in to be executed against the same party, and would have been evidence against the officer in an action on his bond to the sheriff.—[Lord *Lyndhurst*, C. B. How is the entry against the interest of the officer, if he has the prisoner in custody? For, in that case, he is always amenable for an escape before bail bond given.]—This certificate estops the officer from returning *non est inventus*, and fixes him as having made an actual arrest. It would also be useful where the writ contained no *non*

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(a) 3 *Str.* 1128.

(b) 9 B. & C. 317.

(c) 2 *Jao. & W.* 464.(d) 10 *East*, 109.(e) 3 *Taunt.* 305. Per *Lawrence J.* See 10 B. & C. 327.

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omittas clause. This evidence is wholly untainted with suspicion, being made at a time when there could be no prospect of the present question. Whereas *vivá voce* testimony is exposed to all the accidents of prejudice, management, and present interest, in the event of a trial.

On the second point it has been already held in *K. B.* that the plaintiff's acquiescence in this commission, as here proved, does not amount to an estoppel, however strong a subject of observation to a jury. *Bernasconi v. Farebrother (a)*, *Heane v. Rogers (b)*.

Sir *James Scarlett*, *Pollock*, and *Hutchinson*, in support of the rule.—This case is distinguishable from all those cited. Admissions of tenancy are evidence, because the tenant may explain his possession by shewing in what character he holds, thus qualifying his own act, and showing it to be done, not *suo*, but *alio jure*.—[*Lord Lyndhurst*, *C. B.* Possession being *primâ facie* evidence of a holding in fee, such admissions cut it down to a tenancy for years, making therefore a declaration against the interest of the tenant.]—In *Warren v. Grenville (c)* the question was, whether there was a good tenant to the precipe at the time of a recovery suffered by a remainderman in tail, and to make the recovery valid, a surrender of her estate by a tenant for life was to be proved; the debt books of an attorney in which such a deed was charged for, and the money acknowledged to be received, were admitted. *Lord Mansfield*, in *Goodtitle v. Duke of Chandos, (d)* in commenting on the case, said a

(a) 10 B. & C. 551. Hil. 1830.

(b) 9 B. & C. 577; and see the judgment of *Bayley J. S. C.* p. 586. See *Mercer v. Wise*, 3 Esp. 219; *Watson v. Wace*, 5 B. & C. 153; *Lite v. Howe and another*, 6 Esp. 20; *Clarke v. Clarke and another*, 6 Esp. 61.

(c) Stra. 1129.

(d) 2 Barr. 1072.

receipt had been given upon the bill which contained the articles for drawing and engrossing the surrender, so that there was positive proof of an actual surrender." The simple fact of payment, combined with the other circumstances, is admitted to shew the nature of the business done. Again, an entry of the receipt of rents by a party entitled to a particular estate for life, with a power to lease, "reserving the ancient rents," is evidence for the tenant in tail, that the rent so acknowledged was the ancient rent (a); so, where in the book of a court leet a fine is marked as "paid," it is proof that the party was present; for, in both the latter cases, the point to which the evidence is directed is not collateral, but part of the *res gesta*, and with the surrounding circumstances, makes one entire transaction. But if proof of collateral circumstances unconnected with the transaction, could be received, proof of what was said at the time, *e. g.* an admission of the debt, or of who was present, would be admissible if written down by the officer. In *Higham v. Ridgway* (b), which went to the extreme point, when the book was produced *res ipsa locuta est*, it being the only evidence producible, and the juxtaposition of the particular entry to the others, shewed when it was made. The whole being the entry of a man against his interest, is admissible to prove not only the payment, but the collateral matter. — [Lord Lyndhurst, C. B. Suppose *non est inventus* had been returned by the sheriff, this memorandum would not have been evidence, in an action against the sheriff: many entries are inadmissible in evidence, though against the interest of the maker. Thus, on a question whether a man had been tried and convicted, or not, a letter in which he confessed it, could

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(a) *Doe d. Bruce v. Rawlings*, 7 East, 279.

(b) 10 East, 100.

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not be admitted (a).— *Bayley B.* The excepted case is where a subscribing witness to a deed admits on his death-bed that the deed was forged.]—A steward's receipts are not admitted as receipts, but as making him accountable to a third person. Bills of lading signed by the captain are evidence of ownership of the goods between third persons after shipment, even though the captain is alive, for they are negotiable instruments proving in whom the property is. But the memorandum in this case is nothing more than the statement to the sheriff by his officer that he has done his duty, and if receivable against the sheriff, as evidence of the arrest, it cannot be admitted as such between third persons, where a collateral fact foreign to the ordinary duty of the officer, viz. the place of arrest, is alone in issue. In *Salte v. Thomas* (b) prison books were admitted to prove the time an imprisonment began, but not the cause of it. Better evidence of the place of arrest might have been adduced.

Lord LYNTHURST, C. B.—The rule for a new trial must be made absolute. It is allowed by the plaintiff's counsel that, if the memorandum made by the sheriff's officer on the occasion of arresting the plaintiff on the 9th *November* was improperly admitted, the verdict cannot be supported, and we are of opinion that the principle here contended for goes much beyond that of the cases cited, in which evidence of written declarations of deceased persons was thought to be admissible. The question is of so much importance that it should be put on the record for the opinion of a court of error.

BAYLEY B.—I am clearly of the same opinion. I doubt very much whether, if this instrument could be

(a) See *Rex v. Castell Carcinion*, 8 East, 77, and 11 East, 309.

(b) 3 B. & P. 188.

received in evidence at all, it would be admissible to prove the additional circumstance of the place where the arrest occurred, even had the party admitted that the arrest had taken place. It may be the duty of the officer to make a return to the sheriff, that he has, in point of fact, arrested a defendant, but it is not a necessary part of his duty to state the place where the caption took place. Such a statement is, in my opinion, foreign to the duty of the officer, nor is the sheriff, in general, bound to make any such statement in his return to the writ (a). If this document be evidence of the place of arrest, which was the important point in this cause, it might be contended that it was equally evidence of any other fact which the officer might think fit to introduce into it; and we should not know where to stop. Keeping in view, then, the length to which the doctrine contended for would extend, I am of opinion that this document was not admissible in evidence at all. The case is very different from those cited, which mostly turn on the receipt of money; and though one case was cited which occurred in the Common Pleas, as to delivery of goods, yet this is of a very different description. The principle acted on in *Higham v. Ridgway* (b), *Doe d. Reeve v. Robson* (c), and *Middleton v. Melton* (d), is very different. The entry in each of those cases was admitted, on the ground of being against the interest of the party at the time of making it. In *Higham v. Ridgway*, Lord *Ellenborough* expressly says, that the entry was made by the party to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, and the other judges concurred on the principle thus stated. Again, in *Middleton v. Melton*, each of the judges distinctly rests his

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(a) See ante.

(b) 10 East, 109.

(c) 15 East, 33.

(d) 10 B. & Cr. 317.

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decision on this principle. Now, how can this entry be said to militate against the interest of the officer? He has a duty to perform in taking the party if he can, and is answerable to the sheriff for neglect. Here he merely says, I have arrested the defendant in such an action. On that ground I think that this document is not receivable in evidence, and that the rule must be absolute for a new trial.

GARROW, B. concurred.

BOLLAND, B. — The cases cited have carried the principle contended for a great way, but it must not be extended.

Rule absolute.

After verdict for plaintiff, and rule made absolute for a new trial, defendant will not be allowed to amend the pleadings by withdrawing the general issue, and pleading special justification.

At the trial the plaintiff's counsel proved the receipt of money by defendants to his use, and there rested his case. The defendants' counsel then proved his whole case in support of the commission. The plaintiff's counsel then called witnesses to contradict the act of bankruptcy relied on by the defendants, and had the general reply. A rule had been obtained by defendants for liberty to amend the pleadings, by withdrawing the general issue, and justifying specially under the commission, on payment of costs, in order to give the defendants the reply at the trial (a). The COURT discharged the rule, saying that they ought not to give one party any advantage over the other at so advanced a period of a cause (b).

(a) See *Cotton v. James*, M. & M. 273.

(b) *Parker v. Ansell*, 2 Bla. R. 920. S. P. "The intent of new trials is to submit the same questions to the consideration of another jury; but this motion (*viz.* by the *defendant*, for leave to amend by striking out the

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EVANS, an Infant, suing by Prochein Amy MARY
LEWIS, against DAVIS. April 21.

MOTION for a rule *nisi* for an attachment against the *prochein amy* for non-payment of costs pursuant to the Master's allocatur. The facts were, that

Attachment for non-payment of costs by *prochein amy*.

pleas to disprove which plaintiff had given evidence) would be to vary the questions, and perhaps in the very point whereon the plaintiff chiefly relies." S. C. In *Oldenshaw v. Thompson*, 5 M. & S. 164, the defendant's rule for withdrawing the plea does not appear to have been made absolute. And see *Marriott v. Lister*, 2 Wils. 147.

However, amendments have been allowed after rule absolute for a new trial, in the following cases, on the motion of *plaintiffs*. — In *Tomlinson v. Blacksmith*, 7 T. R. 132, the plaintiff had laid his damages at 100*l.* instead of 1000*l.*, and obtained a verdict for 611*l.* before discovering the mistake. Leave was given to amend the declaration by inserting 1000*l.*; but a new trial was granted, to give opportunity to the defendant to make a new defence, as he might have gone to trial before, relying that no damages beyond 100*l.* could be recovered against him. In *Halhead v. Abrahams*, 3 Taunt. 81, a like indulgence was granted, the variance in the declaration being four instead of three dozen chairs, as in the bond. *Halhead v. Abrahams* was cited ineffectually in *Browne v. Knill*, 2 Brod. & B. 397. There a plaintiff had been nonsuited for a variance in stating a qualified covenant to be absolute, and amendment was refused on payment of costs, *Park J.* asking why the party was to be deprived of the benefit to which he had become entitled by the other's laches. The plaintiff was left to his remedy by fresh action. In *Williams v. Pratt*, 5 B. & Ald. 896, after nonsuit for a trifling variance between the declaration and the instrument produced, *Halhead v. Abrahams* was relied on, and plaintiff was allowed to amend his declaration on payment of costs, defendant being left to plead *de novo* or demur. It may be observed, that in both the latter cases a Judge at Nisi Prius would now have express power to amend the record, under 9 G. 4. c. 15.

In *Holland v. Hopkins*, 2 B. & P. 245, the terms of payment of all costs were imposed on the plaintiff, in order to the amending a bill of particulars before a new trial. In *Hooper v. Mantle*, M'Lell. 388, 13 Price, 736, S. C., the plaintiff having obtained a verdict, a rule for a new trial was afterwards made absolute, and plaintiff was allowed to amend, in order to prevent a nonsuit for an apparent variance.

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a Welsh court of great sessions had made the order for payment of costs by the infant plaintiff. A motion was afterwards made in this court for a rule *nisi* for an attachment against the infant for non-performance of that order. The present rule was granted on affidavit of personal service of the former rule on the *prochein amy*, and of a personal demand of the costs from her, shewing her at the same time the Master's allocatur; and was afterwards made absolute, no cause being shewn. (a)

April 21.

COMMELIN v. THOMPSON.

Delivering
paper books.

DEMURRER to replication. Joinder in demurrer. No argument. *Joshua Evans*, for the plaintiff, moved for judgment; but the defendant not having delivered his paper books to the two junior Barons, the motion was refused. (b)

On a subsequent day the motion was granted, paper books having since been delivered by plaintiff on behalf of defendant to the two junior barons. (c)

(a) Tidd, 9th edit. 100. 2 Archb. Pr. 155.

(b) However, *Rex v. Forman*, 11 Pri. 161. is an authority, that in case of such neglect the Court would give judgment against defendant.

(c) See Reg. Gen. Trin. T. 1831, *post*. Since the appointment of a fifth judge in each court of Westminster Hall, it seems necessary to deliver a fifth paper book, and it may probably be considered just that the party *demurring* should deliver it.

1831.

In Re Outlawry of NATHANIEL HINDE, Clerk.


April 21.

ARCHBOLD moved for a rule why a writ of *sequestrari facias* should not issue, directed to the Bishop of *Lichfield and Coventry*, to sequester the profits of two benefices of the defendant, situate in the counties of *Stafford and Salop*, upon a judgment of outlawry against him in K. B. Special writs of *capias utlagatum* had issued at suit of the same plaintiff directed to the same sheriffs, commanding them to inquire by a jury what goods and chattels the defendant had at his outlawry or afterwards, and to extend and appraise them according to their true value, and to take them into the sheriffs hands, and keep them safely so as to answer to the king the value and issues thereof. The respective sheriffs returned the inquisitions made under these writs into the treasury of K. B., and stated thereby that defendant had no goods or chattels, or any lay fee in the bailiwick whereof the sheriffs could cause to be made the debt and damages or any part thereof; but that the defendant had a benefice in each county, and within the diocese of *Lichfield and Coventry*. The writs of *capias utlagatum* with the returns remaining filed with the filazer of K. B. (a), transcripts thereof were filed in Exchequer. The profits of the benefices vesting in the crown on the return of the inquisitions to the writs of *capias utlagatum* are paid into the treasury. Thus, writs in the nature of *sequestrari facias* to the bishop are required, and the bishop will provide for performance of the duty.

Practice—
Requisites for
issuing sequestration
on outlawry
of beneficed
clerk.

The Master having mentioned a similar case to the

(a) See 1 Salk. 352. *Fasacharly v. Baldo*. Com. Dig. tit. Record (G).

1831.  Court, where, on reading the proceedings to outlawry, a like motion had been granted,
 In Re HINDE.

The Court granted the rule, saying, one rule and one writ of *sequestrari facias* were sufficient, there being only one suit and one debt. Though two inquisitions had been rendered necessary by the situation of the benefices in different counties, the bishop as diocesan had power over both.

MARSHALL and Others, Executors of SALFORD, *against*
 BROADHURST.

A testator having contracted to build a wooden gallery, died before any of the work was done. His executors completed it after his death. Held that they were entitled to sue for work, labour, and materials, found by them as executors; for the sum to be recovered would be assets.

ASSUMPSIT. First count, for work and labour by testator in his lifetime. Second count, for goods sold by plaintiffs as executors. Third count, for work and labour and materials found by plaintiffs as executors. Plea, general issue. At the trial at the last *Cheshire* assizes, before *Tindal*, C. J., it appeared that the testator had been employed by the defendant to construct a wooden gallery required for a public dinner; but that none of the work was executed till after the testator's death.

The Chief Justice thought the plaintiffs could not recover for work and labour as executors, and doubted whether the contract survived to them, or whether they could take on them the trade and business of the testator, so as to execute his contracts; but permitted a verdict to be taken for the plaintiff on the count for materials found by the plaintiffs as executors, as the value of those materials would be assets of testator; giving leave to the defendant to move for a nonsuit.

Lloyd now moved accordingly. These materials were employed in work and labour which the executors as such could not execute. Articles used in a work belong to the party furnishing them, till it is executed. The third count is on an entire contract to do several things, viz. to perform work and labour and find materials. *Cotterill v. Apsey.* (a) That case shews that a claim for materials found, cannot be recovered on a count for goods sold. The executors' duty is to get in the debts, sell the stock, &c.; but if they are competent to carry on undertakings contracted for, to be performed by the testator, their power will equally apply to works of a magnitude sufficient to exhaust the whole of any probable assets. The contract here was personal with the testator, and does not extend to the executors, so as to enable them to continue it after his death.

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LORD LYNTHURST C. B.—Is there any authority for the position, that executors may not legally go on with the performance of contracts of their testator, left half executed by him, as far as his assets extend? The nature of this undertaking is very different from that of an author, who undertakes to compose a work, and dies before completing it; that being an undertaking merely personal in its nature, and which by the intervention of the contractor's death becomes impossible to be performed.

BAYLEY B.—If a builder, having contracted to build a house, dies, leaving it half built, can he be paid *pro tanto*, or are his executors bound to carry it on? They may become chargeable, if they do; but on the other hand, the testator's assets in their hands may be made liable for the breach of his contract. At all events, they

(a) 6 Taunt. 324. 1 Marsh. 581. S. C.

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may sue for the testator's materials, supplied by them, for the work he contracted to perform. If a testator contracts for himself *and his executors* to build a house, they would clearly be liable; but if those words are not used, and yet they complete the house he undertook to build, they might sue for the work and labour as done by them *quâ* executors, and the money recovered would be assets. Now, if the money when recovered would be assets, a plaintiff may sue as executor. *Ord v. Fenwick*. (a) Here, the testator's contract being, that certain wood work should be erected; the executors might procure it to be done and pay the workmen. *Cowell v. Watts* (b) establishes that money recovered in this action for materials found, would be assets. Then if an executor applies materials of his testator to complete his undertaking, would not the money recovered be assets? Is there any authority to show that executors may not carry on a testator's business? or that they shall not go on to complete his contracts to a reasonable extent? Many familiar instances might be suggested, in which the half-executed work of a testator ought, for the sake of his estate, to be finished, through the medium of his executors. If his contract were of a nature purely personal or individual, *e. g.* to compose a book, &c. his executors may not incur responsibility; but it does not follow that they may not be liable for damages out of his assets, if they do not perform those of his contracts, which, as in this instance, might be carried on to their completion by others.

The other Barons concurred.

Rule refused. (c)

(a) 3 East, 108. and see the rule stated by Lord Ellenborough, *Cowell v. Watts*, 6 East, 409.

(b) 6 East, 405.

(c) As to personal contracts by deed, see Com. Dig. tit. Covenant (C. 1.) *Hyde v. Dean and Canons of Windsor*, Cro. El. 553.; *Cook, Administratrix, v. Calcrafft*, 2 Bla. R. 856.

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WILLIAMS *against* WILLIAMS.

April 15.

R. V. RICHARDS moved for a rule to enter up judgment in this Court, on a warrant of attorney given to confess an action and enter up judgment thereon, in the (late) Court of Great Sessions of *Merionethshire*.

Judgment cannot be entered up in the Exchequer, on a warrant of attorney to confess judgment in a Court of Great Sessions.

But the Court, after referring to the terms of 11 G. 4. & 1 W. 4. c. 70. s. 14., said they had no jurisdiction where the authority to enter up judgment below had not been acted upon by motion before the abolition of the Court below, for without that step no suit was "depending" in that Court; and refused the rule. (a)

ATTORNEY GENERAL V. CARPENTER.

April 20.

DEFENDANT having been served with a notice to plead to an information by the Attorney General in the King's Remembrancer's Office, was there informed that he could only plead in person by order of the Court.

Pleading in person to information by the Crown.

On filing an affidavit of the above facts, the defendant was now permitted to put in his plea in person, without delivering to the Attorney General any rule, or order of Court, for so pleading.

(a) S. P. in another case,—*Halcomb*, for the rule.

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LAUGHER v. LAUGHER.

The party deputed by power of attorney to receive payment of a sum awarded, must not only shew the letter of attorney to the party, but must give him a copy thereof.

J. JERVIS had obtained a rule for an attachment for non-payment of a sum of money with costs, pursuant to an award and the Master's allocatur. The reference was by rule of Court, and it appeared by the affidavits, that a power of attorney, dated 23d of December, 1830, by which one *Hemming* was authorized to demand from defendant the money awarded, was signed by plaintiff in presence of a subscribing witness. *Hemming's* affidavit shewed personal service on defendant of true copies of the rule of reference, and the allocatur, and of the award annexed to the affidavit; and also stated, that he shewed defendant the originals of the rule, allocatur, and award at the same time. It proceeded to state, "That by virtue of the letter of attorney to him, the deponent, for that purpose made and given by the said plaintiff, *Charles Laughher*, bearing date, &c. last, also annexed to the affidavit, &c., and which he, the deponent, likewise at the same time produced and shewed to the said defendant, he, deponent, demanded of him the said defendant the payment of the sum awarded, with the costs, being the sums mentioned in the letter of attorney," and that the defendant refused payment.

There was no affidavit by the subscribing witness of the execution by the plaintiff of the letter of attorney, nor any proof that a copy thereof was left with the defendant.

Clarke and *Holroyd* shewed cause.—First, the defendant could not be brought into contempt, without the

same proof of the letter of attorney by the subscribing witness, which would be necessary to establish a plaintiff's case in an action. Secondly, the demand of the sum awarded being made by a third person; a copy of the letter of attorney should have been delivered to the defendant, in order to enable him to resist any demand on him by a third person.—They cited Lord *Kenyon's* authority from *Tidd*, 9th edition, 837.

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J. Jervis supported the rule.—The due execution of the letter of attorney will be presumed from the affidavits. In an action to recover this money, no demand of it, or power of attorney to receive it, need be proved. On the other point, Mr. *Tidd* cites *Longman v. Holmes*, (a) as contrary to the dictum relied on by the other side.—That case shews that an indorsement on an award of authority to demand the sum awarded is sufficient.

LORD LYNTHURST C. B.—It was most important that the party against whom the award was made should have a copy of the letter of attorney, in order to protect himself against any other demand, by shewing that he paid the money under a competent authority. Besides which, with reference to the person of the party demanding the money, the defendant may be desirous to ascertain the terms of the letter of attorney. The case cited from *Blackstone* does not shew that the award as there indorsed was not produced to the defendant, or that a copy was not left with him so as to shew the authority on which the money was claimed from him. The master certifies, that the modern practice has been to deliver a copy of the power of attorney with that of the master's allocatur, and that practice is supported by reason.

(a) 2 W. Bla. 990.

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BAYLEY B.—The defendant had only a transitory opportunity of looking at the original letter of attorney when shewn him. — Besides, the affidavit of its execution is not made by the attesting witness.

GARROW B.—The payment of costs under the Master's allocatur might be demanded by any person, but payment under this letter of attorney could only be claimed by *Hemming*, when duly authenticated to be the party mentioned in it. The defendant has a right to be assured, that the party claiming payment from him is entitled to receive it, so as to protect him against claims by others. Now, service of a copy of the letter of attorney puts the defendant on his guard, enabling him to compare it with the original, and to see whether the latter is properly executed.

BOLLAND B. concurred.

Rule discharged (with costs, it having been so moved.) (a)

(a) Thus, in order to obtain a rule nisi for an attachment for not performing an award, the affidavits of the attesting witnesses should shew the due execution of the award and power of attorney (if any). The date of executing the award, (6 Taunt. 251.), the personal service on defendant of copies of the award, of the original rule or order of reference, of the Master's allocatur, and power of attorney, if any, must also appear on affidavit. It should also be sworn that the originals of the award and power of attorney, (*Jackson v. Clarke*, M'Lell. 72.) rule of reference, and allocatur were at the same time produced and shewn to defendant; and that a personal demand of the sum awarded and costs, pursuant to the allocatur, was made on defendant, who refused to pay. As to the additional requisites, where the time for making the award has been enlarged, see *Tidd*, 837. 9th ed.

In *Bass v. Maitland*, 8 B. M. 44. a rule for an attachment, obtained under similar circumstances, was made absolute in C. P. on demand by a third person, who did not shew the power of attorney or give a copy of it; but that decision turned on the defendant there being an attorney of the Court, who ought to have shewn other plain and satisfactory cause against the attachment.

IN THE EXCHEQUER CHAMBER.

LEATHLEY v. HUNTER and Others.

(In Error from the King's Bench.)

Before TINDAL, L. C. J.—Lord LYNDHURST, C. B.— May 7.
 ALLAN PARK, GASELEE, and ALDERSON, Justices;
 GARROW and BOLLAND, Barons.

ASSUMPSIT by insured against underwriters on Insurance on goods in ship *Java Packet*, at and from *Sincapore*, *Penang*, *Malacca*, *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*—or to any port or ports in the *United Netherlands*—or to *Altona* or *Hamburgh*, all or any—with leave so touch, stay, and trade at all or any ports and places whatever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times, and in all places until safely arrived and landed at the ship's wheresoever in the *East Indies* or elsewhere, beginning the adventure on the goods from the loading thereof on board as above; with leave also, in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly *Sincapore*, *Penang*, *Malacca*, *Batavia*, *Cape of Good Hope*, and *St. Helena*.—The ship having taken coffee on board at *Batavia*, proceeded to *Sourabaya*, a port in *Java*, 400 miles E. of *Batavia*, and out of the course from *Batavia*, *Sincapore*, *Penang*, or *Malacca*, to *Europe*, and took more coffee on board there. She then returned to *Batavia*, and having sailed from thence for *Europe*, was lost.—Held, 1. That the voyage was a voyage within the policy: 2. that the trip to *Sourabaya* was no deviation: and 3. that the coffee shipped at *Sourabaya* was covered by the policy, as well as that shipped at *Batavia*.

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port or place of discharge, beginning the adventure upon the said goods from the loading thereof aboard the ship as above; with leave to call at or off any port or place in *Great Britain*, and wait for orders upon the said ship — and with liberty also *in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever in any direction, and for any purpose necessary or otherwise, particularly Sincapore, Penang, Malacca, and Batavia, Cape of Good Hope, and St. Helena*, with leave to take on board, discharge, re-load, or exchange goods or passengers, without being deemed any deviation, and without prejudice to the insurance.

The declaration then stated that the interest in the goods intended to be insured was declared to be all in the *Java Packet* on coffee, of which the defendant had notice, and that defendant subscribed the policy : That on 12th Sept. 1826, at *Batavia*, 10,000 peculs of coffee were shipped on board said vessel, “ to be carried and conveyed thereon on the said voyage in the said policy mentioned, to wit, towards and into *Antwerp*, being a port in the said *United Netherlands* mentioned.” That afterwards, on 14th Oct. 1826, to wit, at *Sourabaya*, being a certain port or place which the said ship or vessel proceeded and sailed to, and touched and staid at, under and by virtue of the said policy of insurance, to take on board goods, 10,000 peculs of other coffee, and 10,000 bags of coffee of great value, &c. were shipped and loaded in and on board the said ship or vessel, to be carried and conveyed therein to *Antwerp*. Averment of interest of the plaintiffs at the time of the loss of the goods, and that the *Java Packet* departed and set sail from *Batavia* on her said voyage towards *Antwerp*, and was *totally lost with goods* by perils of the seas before her arrival there.

The premium in the policy was 6*l.* 6*s.* per cent., with a memorandum underwritten, that the insurance was on

goods as interest might appear, with leave to declare the same hereafter. The insurance was declared at the foot of the policy to be "all in the *Java Packet*, on coffee." At the trial before Lord *Tenterden* C.J. at the *Guildhall* Sittings after *Hilary* Term, 1829, a special verdict was agreed to, in which the following facts were stated:—

The policy sued on was effected by *M^r Allum*, as agent to *Hunter*, the plaintiff below, and was subscribed by defendant below for 300*l*. The interest insured was declared to be "all in the *Java Packet* on coffee." At *Batavia* in the island of *Java*, in the *East Indies*, coffee of the value of 923*l*. was loaded on board the ship by the plaintiff below, with intent that the same should be carried to *Antwerp*. The ship having taken in this coffee in the prosecution of the adventure, proceeded from thence with the same on board to *Sourabaya*, another port in the said island of *Java*, and there loaded another quantity of coffee of the value of 5,368*l*. 16*s*. 6*d*. to be also carried to *Antwerp*, making the whole value of the coffee loaded by the plaintiff below 6,292*l*. 5*s*. 0*d*., the whole sum insured being 7,500*l*. The premium of 18*l*. 18*s*. 0*d*. actually paid was greater than that contracted for. No other goods were shipped by the plaintiff below in respect of the insurance effected by the said policy. The ship returned from *Sourabaya* to *Batavia* with the coffee shipped at both those places, and afterwards sailed therewith from *Batavia* for *Antwerp*, but was totally lost with all the goods on her voyage. *Sourabaya* is distant from *Batavia* 400 miles eastward, and is not in the direct course from *Batavia*, *Sincapore*, *Penang*, or *Malacca*, to *Europe*, nor in the direct course from any one to any other of those four places, but directly out of the course from each of them to any other of them. *Sincapore*, *Penang*, *Malacca*, or *Batavia* are not according to the order in which they are mentioned in the policy in the direct course of a voyage therefrom to

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Europe, but the direct course of a voyage from the said four places to *Europe* is according to the following order, viz. *Penang, Malacca, Sincapore, Batavia*. Any port or place in *Persia* is more than 1000 miles out of the course from any one of the said four places to *Europe*.

The questions were, Whether the voyage actually made was covered by the policy, or whether the trip to *Sourabaya* was a deviation? and, Whether the coffee shipped at *Sourabaya* only, or that shipped at *Batavia* and *Sourabaya* also was insured by the policy. The judgment below was for the plaintiffs, the insured, for the whole value and the surplus premium paid.

Maule, for the plaintiff in error, (the underwriter,) made three points :

1. The ship when lost was not on the voyage insured from *Batavia* to *Europe*.

2. If she sailed on such voyage, the going to *Sourabaya* was a deviation.

3. If it was no deviation to go to *Sourabaya*, still that was not a loading port within the policy, and consequently the coffee loaded there was not covered by the policy.

First, The voyage insured cannot be said to begin at the second departure of the ship from *Batavia*, for the plaintiffs seek to recover on the insurance of goods put on board before. Then on her first departure the ship did not set out on the voyage towards *Antwoerp*, viz. westward, for *Sourabaya* is 400 miles eastward of *Batavia*. The leave to touch at certain ports must be restricted to the course of them between the *termini* of the voyage which are here described in the *East Indies* and *Europe*. The voyage then is misdescribed in the declaration.

Secondly, If she sailed from *Batavia* the first time on the voyage insured, her trip to *Sourabaya* was a de-

viation. Leave to touch enables a ship to put into a port which she passes in the course of her voyage, thus relieving her from pressing directly to her ultimate destination, but does not authorize her to go purposely to a place out of her voyage. Thus, though this ship might touch in *Persia*, which is found to be 1000 miles out of the course, it is not contrary to, or beyond it, as *Sourabaya* is.—[Lord *Lyndhurst* C. B. *Sourabaya* is not found to be out of the course from *Batavia* to *Persia*, though it is found to be out of the course from *Batavia* to *Europe*; now the words *as above* subjoined to the first leave, include the whole antecedent clause in the policy. Then the second leave confers further powers of “proceeding in any direction, and for any purpose necessary or otherwise,” words not required to prevent doubt as to visiting the places named there out of geographical order, and not confining the further powers to those latter places.]—The words “in any direction” mean that the ship might proceed to the places named, though not in the order of a voyage to *England*, and are governed by the words “in this voyage” and “to proceed to,” which are always purposely retained in the printed part of the policy.—[Lord *Lyndhurst* C. B. A leave reserved to touch at a particular place permits the ship to go thither out of the geographical course of the voyage insured. *Metcalf v. Parry* (a).]—The voyage there insured being from *Antigua* to *England*, with leave to touch at all or any of the *West India Islands*, including *Jamaica*, touching at *St. Kitts* was held no deviation. But the *West India Islands* are of limited extent: whereas, if the words in the leave “all places whatsoever and wheresoever” are to be taken in their full sense, without reference to the course of the voyage the ship might have touched at *Kamschatka* on the voy-

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(a) 4 Camp. 123. Gibbs, C. J. 1814.

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age from *Batavia* to *Europe*. The words "at all times" in the first leave, construed in like manner, might continue the liability of the insurers to a period only limited by the duration of the ship. In *Hogg v. Horner* (a), a ship insured at and from *Lisbon* to *England* had liberty to "call at any one port in *Portugal* for any purpose whatsoever," and after leaving *Lisbon* completed her cargo at *Faro*, a port south of *Lisbon*. Lord *Kenyon* held that trip to be a deviation, saying, the the leave must be restrained to permission to call at a port in the course of the voyage to *England*, viz. northward. The words "in that voyage," in the printed part of the policy cannot be thus deprived of effect, and distinguish this case from *Metcalf v. Parry*, and *Mellish v. Andrews* (b), where a liberty to touch not being so qualified, received a wider construction. Though in the latter case, no *terminus ad quem* in the *Baltic* could be fixed at the time of the insurance, still a voyage to *Lisbon* would have been a deviation. In *Bottomley v. Bovill* (c), the insurance was on a ship. The voyage was "from *London* to *New South Wales*, and from thence to all ports and places in the *East Indies* or *South America*, with liberty for the ship in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, and for all purposes whatsoever, particularly to trade, and sail backwards and forwards, and forwards and backwards. But the general words of leave were held to be restrained by the clause describing the voyage insured, viz. the voyage either to *South America* or the *East Indies*, or some intermediate voyage having for its ultimate object the accomplishment of that voyage.

Thirdly, If the trip to *Sourabaya* was not a deviation, that was not such a "loading port" as entitles goods

(a) 2 Park on Insurance, 444. 1 Marsh. Ins. 184. See *Ranken v. Bow*, S. P. 2 Park Ins. 446.

(b) 2 M. & S. 27.

(c) 5 B. & C. 210.

taken on board there, to the protection of the policy. A ship may proceed with leave to a port, which notwithstanding, is not considered a loading port. In *Grant v. Parton* (a) the insurance was on goods at and from China, to all or any ports or places whatsoever, and wheresoever in the *East Indies, Persia*, or elsewhere, &c. until the ship's safe arrival at *London*, beginning the adventure on the said goods from their loading at *China*; with liberty in that voyage to proceed and sail to and touch at any ports or places whatsoever, for any purpose whatsoever. It was held, that the goods insured were the particular cargo put on board at *China*, and not a second cargo shipped elsewhere, between *China* and *London*, viz. at *Bombay*.—[*Lord Lyndhurst C. B.* No liberty was there given to *trade* at any intermediate places.]—*Grant v. Delacour* (b) was an action for the same loss, but on another policy, insuring a voyage out and home, and containing the additional words “forwards and backwards at sea,” a trading and return with a different cargo being there contemplated; the fresh cargo was held protected by the policy. As *Violett v. Allnutt* (c) was decided on refusing a rule for a new trial, it may have proceeded on an imperfect statement of counsel. There, on an insurance on goods, at and from *Plymouth to Malta*, with liberty “to touch at Penzance, or any other port in the channel to the westward, for any purpose whatever,” beginning the adventure at *Plymouth*; goods loaded at Penzance were held protected by the policy. *Barclay v. Stirling*, (d) was an insurance on freight at and from the ship's port of loading at *Jamaica*, to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading thereof aboard as aforesaid, with leave

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(a) 1 Taunt. 463.

(b) 1 Taunt. 466.

(c) 3 Taunt. 419.

(d) 5 M. & S. 6.

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to discharge, exchange, and take on board goods at any port she might call at; and underwriters were held entitled to recover from the owners the amount of freight earned for goods shipped at an intermediate port, and brought to *England* after a total loss adjusted: but there no clause existed, explicitly limiting the commencement of the adventure. There were no goods to which the printed words "beginning the adventure on the goods from the loading thereof aboard the said ship" could apply; those words therefore were immaterial. The real ground of the case was, the receipt by the assured of a full indemnity. They were therefore trustees for the underwriters for the freight received beyond the indemnity. (a) If the event insured against turns out a gain, the assured can only recover nominal damages. *Godsall v. Boldero*. (b)

Joshua Evans, for the defendants in error, was directed to confine his argument to the last point. *Violet v. Allnutt* and *Barclay v. Stirling* decide, that where a ship has leave to touch or call at a port, it may be considered a loading port. *Violet v. Allnutt* is approved by the Court in the latter case. Then is there any real distinction *quoad hoc* between an insurance on freight or on goods?—[*Lord Lyndhurst*, C. B. No such distinction is made in *Barclay v. Stirling*; and *Holroyd J.* expressly says, that the policy covers goods loaded at an intermediate port during the voyage from *Jamaica* to her port of discharge.]—*Robertson v. French* (c) was an insurance on goods, beginning the adventure on them from the loading at *Brazil*; and it was held, that the policy only covered goods put on board after the beginning of the adventure. Lord *Ellenborough's* judgment (d) shews, that policies of insurance are to be construed by the

(a) See the judgment of *Bayley*, J. 5 M. & S. 13.

(b) 9 East, 72.

(c) 4 East, 130.

(d) Id. 140, 141.

same rule as other instruments, and in cases of doubt, on the sense of the whole; the written words are to have a greater effect attributed to them than the printed; inasmuch as the former are the immediate terms selected by the parties themselves to express their meaning. By the words ship, freight, goods, money lent on bottomry or *respondentia*, or the like, written on the margin of the policy, its general terms applicable to other subjects besides the particular one so mentioned in the margin, are thereby considered as narrowed in point of construction to that one—"The meaning of which marginal memorandum may be translated thus. We mean to insure the subject so named, '*freight*' for instance, arising and accruing during the limits of the voyage within described from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and on the premium herein specified. In other words, we adopt the general language of the policy as far as it may serve to effectuate this object and no further."

The object of the assured was to secure themselves on a *seeking* voyage, (a) they not knowing at what port the goods may be put on board. Had any particular place of lading been mentioned, the goods would not, by the terms of the contract, be covered by the policy, except they were loaded there: *Metcalf v. Parry* is as applicable to a seeking voyage as to a deviation, and this policy will protect a party in going from port to port in search of a cargo, though they may not lie in a direct course between the *termini* of the voyage. *Lambert v. Liddard*. (b)

Maule in reply on the last point.—In *Barclay v. Stirling*, the insurance being on freight, if there had not

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(a) See per Lord *Ellenborough* in *Mellish v. Andrews*, 2 M. & S. 33.

(b) 5 Taunt. 480.

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been leave to take in goods at *Cuba*, the underwriters under the circumstances would have had a right to recover in that form of action, as the assured had already received a complete indemnity for their loss. *Violet v. Allnut* was a policy on goods; all that was decided being that a liberty to touch for any purpose whatever must include a right to ship goods. Policies on freight and on goods must be differently construed, because the former is effected by the owner of a ship who is interested in her from the beginning to the end of the voyage; whereas the owner of goods on board only wishes to pay for protection from the particular ports where he expects them to be put on board, and not from any port at which the ship may touch.

The Court said, they had no doubt on their decision, but would look into the cases.

Cur. adv. vult.

TINDAL, C. J. afterwards delivered judgment.—In this case in which judgment has been given for the plaintiffs in the original action, it appears to be unnecessary to recapitulate the declaration or the facts found by the special verdict; it will be sufficient to make such reference to them as is necessary to explain the grounds of the judgment now given by the Court.

The writ of error was brought by the defendant below, and the objections which have been taken to the judgment of the Court of King's Bench, and which are relied on in argument by the counsel for the plaintiff in error, were in substance three; *viz.*

First, That the ship never sailed on the voyage described in the declaration, or in other words, that there was a misdescription of the voyage.

Secondly, That upon the facts stated in the special verdict, the sailing from *Batavia* to *Sourabaya* and back, was a deviation. And,

Thirdly, That at all events, the goods shipped at *Sourabaya* are not covered by the policy.

The first objection urged is, that the voyage for which the ship was insured, was a voyage from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to any port in the *Netherlands*; that the ship sailed with part of her cargo on board from *Batavia* to *Sourabaya*, a port 400 miles to the eastward, where she loaded other part of her cargo and then returned to *Batavia*, and thence set sail to *Antwerp*, and that this was not the voyage insured, and that the ship sailing on a different voyage from that described in the policy, the underwriters are altogether discharged.

In order to ascertain the validity of this objection, it will be necessary to advert to the terms in which the voyage itself is described in the policy, and the leaves or licences for which the assured has stipulated, and also to advert to those facts stated in the special verdict which bear on this part of the question.

Now the voyage is described in the policy "at and from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona* or *Hamburgh*, all or any, with leave to touch, stay and trade at all, or any ports or places whatsoever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times, and in all places, and until safely arrived and landed at the ship's final port or place of discharge."

The adventure is then declared by the policy to be on goods "in the good ship or vessel called the *Albion*, *Bolivar*, *Java Packet*, and *Blora*, all and any," and the

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commencement of the adventure is then stated to be "upon the said goods and merchandizes from the loading thereof, on board the said ships as above."

After this is inserted a second or further clause of leave or licence, in these terms; "and it should be lawful for the said ship, &c. in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever in any direction, and for any purpose necessary or otherwise, particularly *Singapore, Penang, Malacca, Batavia, the Cape of Good Hope, and St. Helena*, with leave to take on board, discharge, re-load, or exchange goods or passengers without being deemed any deviation from, and without prejudice to the assurance. This policy was afterwards declared to be "all in the *Java Packet* in coffee."

Now looking at the terms in which this policy is effected, and construing it in the plain, ordinary, and popular sense, in which these terms are to be understood, there being no peculiar sense as far as we are aware which the words have acquired, distinct from their popular sense, we think the voyage in question is a voyage intended by the parties to be, and is in fact covered by the description of the voyage contained in the policy.

The voyage performed by the ship is described in the special verdict thus: "That the ship being at *Batavia*, a certain quantity of coffee of the value, &c. was there loaded in and on board the said ship or vessel by the assured, with the intention that the said coffee should be carried in the said ship to *Antwerp*, and that *Batavia* is a port in the island of *Java*, one of the islands in the *East Indies*; and that the said ship "having taken in the said coffee at *Batavia*, in the prosecution of the adventure proceeded from thence with the same coffee on board her to *Sourabaya*, which is another port in the island of *Java*; and that the assured there loaded a cer-

tain other quantity of coffee of the value, &c. on board the said ship, with the intention that the same should be carried in the said ship to *Antwerp* aforesaid."

The special verdict afterwards states, " that the said ship, in the course of the adventure, returned from the said port of *Sourabaya*, to the said port of *Batavia*, with the said coffee so shipped on board her at *Batavia* and at *Sourabaya* aforesaid, and that the said ship afterwards sailed therewith from the port of *Batavia* for *Antwerp* aforesaid; and that *Sourabaya*, to which place the said ship proceeded from *Batavia*, and where she took in coffee as aforesaid, is not in the direct course from *Batavia*, *Sincapore*, *Penang*, or *Malacca*, to *Europe*, nor in the direct course from any one of those four places, *Sincapore*, *Penang*, *Malacca*, or *Batavia*, to any other of those four places; but the said port of *Sourabaya* is directly out of the course from each of the said four places to *Europe*, and from each of the said four places to any other of them, and is distant from *Batavia* 400 miles eastward; and that *Sincapore*, *Penang*, *Malacca*, and *Batavia* are not, according to the order in which the said four places are mentioned in the policy, in the said course of a voyage therefrom to *Europe*; but that the direct course of a voyage from the said four places to *Europe*, is according to the following order, viz. *Penang*, *Malacca*, *Sincapore*, *Batavia*, and that any port or place in *Persia* is more than 1000 miles out of the course from any of the said four places to *Europe*."

The underwriter contends that, when the ship sailed from *Batavia*, after the risk had commenced, to *Sourabaya*, to take in a further cargo, and then sailed back to *Batavia*, she sailed on a voyage not within the policy, or within either of the leaves or licences contained therein. But independent of the large and general words used in the description of the voyage, and the very extended powers given by the policy, the situation of the assured,

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and the circumstances under which it was effected, as they must be inferred from the policy itself, make it probable that a contract of the most open and comprehensive kind was intended to be effected. This was an insurance on goods, not on ships. At the time the policy was effected the assured was uncertain from what port or ports of the *East Indies* or *Persia* his cargo would be shipped by his agents; whether all at one place, or part at one and part at another. He was further uncertain by what ship or ships, out of four which are named in the policy, his cargo would be carried; from what port or ports, out of four that are enumerated, such ship or ships would sail. He could neither foresee into what ports or places, nor for what purposes the owners of the ships might send them, nor could he control such directions; and therefore, he frames a description of the voyage in such comprehensive terms as may comprise a loading of the cargo, either at one port or at various ports and places in the *East Indies*, and powers and licences are also inserted in the policy, so as to meet almost every possible contingency of the destination or employment of the ships, without endangering his right to recover for a loss upon the goods, either on the ground of misdescription of the voyage, or of any deviation. Looking at the policy with this view, we think the words of the policy are large enough to carry such intention into effect, and that the sailing from *Batavia* with part of the cargo to *Sourabaya*, and taking in other part of the cargo there, and then returning from *Sourabaya*, by way of *Batavia* to *Europe*, was a voyage within the contemplation of, and protected by, the policy.

It is argued on the part of the underwriter, that if the clause first inserted is taken alone, the meaning of the words "touch, stay, and trade at all or any ports whatsoever in the *East Indies*" can only mean such ports and places as the ship may touch at in the *usual course* of a

voyage from one or other of the four enumerated places to *Europe*; that the leave to stay and trade implies that the ship is lawfully at the place where such trading and staying is to take place, that is, some port or place in the course of the voyage. But that this cannot be the meaning of the present policy appears clear from the remainder of the clause, viz. "any ports or places whatsoever, in the *East Indies*, *Persia*, or elsewhere." Now, as the special verdict has found expressly, that any port or place in *Persia* is more than 1000 miles out of the course from any of the said places to *Europe*, it follows that the trading cannot be intended to be confined to such ports or places only as the ship touches at in the course of such voyage. In the same manner as in the case of *Metcalf v. Parry* (a), where the clause was "with liberty to call at all or any of the *West Indian* islands, *Jamaica* included," it was held that the insertion of *Jamaica*, which was 500 miles out of the usual course, shewed the intention to be that the ship might stop at any of the islands, though out of the course of the usual voyage.

Again, taking up the question on the second clause of licence, the words used are, taken altogether, of a meaning equally general with those in the first, viz: "it should be lawful for the said ship, in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever or wheresoever, in any direction, or for any purpose." It is contended that the generality of this licence is restrained by the words "in that voyage," but upon that construction what sense can be given to the words "in any direction?" Words that are irreconcilable with touching, for the purpose of trade, in the onward course of the voyage only, and the insertion of these words in the policy distinguishes the case from that

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of *Hogg v. Horner* (a), which was cited on the part of the plaintiff in error. Upon the whole, therefore, we think the shipping part of the cargo at *Batavia*, and thence proceeding to *Sourabaya* and shipping other part of the cargo there, and thence sailing back to *Batavia*, and thence with the cargo to *Antwerp*, was a trading voyage from *Batavia* to *Antwerp*, by the way of *Sourabaya*, with the intention of the parties, as expressed in the policy, and the two several clauses of licence contained therein.

Having, therefore, fully considered this the first objection made, it becomes scarcely necessary to do more than advert to the two which remain. For if the sailing from *Batavia* to *Sourabaya*, and back to *Batavia*, and thence to *Europe*, is a voyage described in the policy, it follows immediately that it cannot be treated as a deviation. Indeed, as one of the places to which the ship might go on the voyage is a port in *Persia*, and as the special verdict does not find that *Sourabaya* is out of the course to *Persia*, we should not be justified upon this more restrained ground in considering this as a deviation from the voyage insured.

As to the third point, that the goods landed at *Sourabaya* are not covered by the policy, the question is, Whether *Sourabaya* is a loading port within the meaning of the policy? Besides referring to the opinion we have already expressed on the first objection, which also involves this question, we think the two cases of *Violett v. Allmutt* (b), and *Barclay v. Stirling* (c), go the full length of establishing that, under the usual clause in a policy, "with liberty to touch at a port for any purpose whatever," is included a liberty to touch for the purpose of taking on board part of the cargo covered by the policy, after the policy had attached on part taken in at the

(a) *Park on Insurance*, 444.

(b) 3 Taunt. 419.

(c) 5 M. & S. 6.

loading port; and in this case the leave is not confined to touching and staying, but extends expressly to taking on board, discharging, reloading, and exchanging goods.

Upon the whole, therefore, we think the plaintiff below entitled to recover the loss upon the whole of the cargo, both that loaded at *Batavia* and that loaded at *Sourabaya*, and therefore think the judgment given by the Court of King's Bench should be affirmed.

Judgment affirmed.

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SOLARTE and Others, Assignees of ALZEDO, a Bankrupt, against PALMER and Another.


April 22.

ASSUMPSIT by indorsees against indorsers of a bill of exchange for 682*l.* drawn by *Keats* upon and accepted by *Jones & Co.*, indorsed by *Keats* to the defendants and by the defendants to the bankrupt *Alzedo*, whose assignees were the plaintiffs below as well as in error. The declaration averred non-payment by the acceptors and notice thereof to the defendants. At the trial before *Lord Tenterden* at the Guildhall Sittings, the defence was rested on the insufficiency of the notice of non-payment given to the defendants. — The plaintiffs proved that the bill, which had been deposited by the plaintiffs at their London bankers, was duly presented by them for payment, on the 15th of *December*, the day it became payable, and was refused payment; that on the 16th of *December* (a) it was returned to the plaintiffs for non-payment, and that on the 17th (a) the plaintiffs

The notice of non-payment of a bill by the acceptor, given by the holder to the drawer or indorser, should, either expressly or by necessary implication, inform him that it has been dishonored, and that the holder looks to him for payment.

(a) *Haynes v. Birks*, 3 B. & P. 599; *Scott v. Lifford*, 9 East, 347; *Langdale v. Trimmer*, 15 East, 291.

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caused Messrs. *Pearce*, their attornies, to write a letter to the defendants couched in the following terms.

Addressed to Messrs. *Palmer* and *Bouch*.

“ Gentlemen,

“ 17 *December* 1825.

“ A bill for 682*l.* drawn by Mr. *Joseph Keats* upon Messrs. *Daniel Jones* and *Co.* and bearing your indorsement, has been put into our hands by the assignees of Mr. *J. R. Alzedo*, with directions to take legal measures for the recovery thereof, unless immediately paid to,

“ Gentlemen, Yours, &c.

“ *J. & S. Pearce.*”

The receipt of this letter by the defendants, on the 17th of *December*, was proved. Lord *Tenterden* told the jury that this letter was not such a sufficient notice of the dishonour and non-payment of the bill of exchange declared on, as would intitle the plaintiffs to support their action against the defendants. A bill of exceptions was tendered to this direction by the plaintiffs' counsel. The jury gave a verdict for the defendants, and judgment having been entered up thereon, a writ of error was brought, which was now argued by

R. V. Richards for the plaintiffs.—This is a notice by the holder, pointing out the date and amount of the bill, with the names of the drawer and acceptor, and addressed to the indorsers, and sufficiently imports that the holder intended to charge the defendants. The purpose of such a notice is to apprise persons collaterally liable on a bill that the holder looks to them for payment, and if that information is substantially conveyed, no particular form of words is requisite. This rule, collected from

Tindal v. Brown (a), is adopted in the best text writers (b), and by Lord *Tenterden* in *Hartley v. Case* (c). If the letter had stated that the bill had been dishonoured, without adding by whom, viz. whether by indorser or acceptor, no more information would have been conveyed. The *dictum* of *Ashurst J.* in *Tindal v. Brown*, that "notice means something more than knowledge, because it is competent for the holder to give credit to the maker," is explained by *Buller J.* in the same case, thus: "Though there is no prescribed form of this kind of notice, yet it must import that the holder considers the indorser as liable, and expects payment from him, that he may have his remedy over by an early application, then it becomes his business to take up the note." In this case the notice does not merely convey the knowledge that the bill was not paid, but also shews that the holder will take legal measures if it is not paid. That satisfies the test in *Ashurst J.*'s judgment, that the notice did not only shew that the acceptor does not intend to pay, but that the holder does not intend to give credit. [Lord *Lyndhurst C. B.*—It would be quite consistent with the notice contained in this letter that the holders had committed laches in not duly presenting the bill for payment, and had thereby lost their remedy against the drawer and indorsers. A notice that the bill had been dishonoured by the acceptor, would import that it had been duly presented and payment had been refused.]—Supposing this notice falsely gave notice of a liability which never existed, the demand of payment put the indorsers on their guard, and shews they are looked to for payment.—[Lord *Lyndhurst C. B.* Is the defendant to infer the existence of every previous fact necessary to

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(a) 1 T. R. 169.

(b) *Bayley on Bills*, 4th ed. 206; *Chitty on Bills*, 6th ed. 226; 2 Stark. on Ev. 261.

(c) 4 B. & C. 339.

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produce his liability, from the threat of legal proceedings? In *Tindal v. Brown*, Buller J. says, "The purpose of giving notice is not merely that the indorser should know that the note is not paid, for he is chargeable only in a secondary degree; but to render him liable you must shew that the holder looked to him for payment, and gave him notice that he did so;" but though the above are pointed out as requisites of the notice, it is not there decided that no further information is necessary.] In *Hartley v. Case (a)*, a bill was drawn by *Richard Jesson Case* on a person similarly named, and accepted by him as *R. J. C. the elder*. The indorsee sued the drawer and proved his notice addressed to the defendant in the following terms: "I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft drawn by *Mr. Case* on *Mr. Case*, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which will otherwise immediately take place." That notice gave no information respecting which *Case* was intended.—[*Tindal C. J.* Their persons must have been different; at all events no such notice would have been necessary to *Case* the acceptor.]

Whateley contra, for defendants.—It is of great importance that the notice should contain clear information of the dishonour, by stating what the bill is, that payment has been refused by the acceptor, and that on that account the holder looks to the indorser for payment. If no notice of dishonour is given, the law presumes injury to the drawers and indorsers, in preventing their taking timely steps to obtain payment from the parties respectively liable to them (*a*). He referred to *Marius*,

(*a*) 4 B. & C. 339.

(*a*) See *Whitfield v. Savage*, 2 B. & P. 280; *Orr v. Maginnis*, 7 East, 362; see Bayley on Bills, 4th ed. 295.


4th Edit. 21. *Beawes' Lex Mercatoria*, 6th Edit. 571.—
 [Tindal, C. J. Protest being always necessary on non-payment of a bill abroad, foreign writers contain little on the subject of notice.]—The requisites of a formal protest are here supplied by averments of presentment and demand of payment, refusal to pay and notice to defendant of the premises, but the notice proved does not support those averments. It does not even state acceptance of the bill, far less its dishonour. Suppose the defendant had paid the bill according to notice, without knowing the acceptor, or that laches in presentment to him had occurred, he would have lost his remedy against the other parties to the bill, whose liability was discharged by that laches.—[Lord Lyndhurst, C. B. This notice does not put the defendant on his guard, unless he can so far infer from it that the bill was not paid as to apply to a previous indorser for the amount.]—*Hartley v. Case* shews that a notice of dishonor must inform the party to be charged that payment of the bill has been refused by the acceptor. There a mere demand of payment was held insufficient.

Richards in reply.—As acceptance of the bill, if alleged, need not have been proved between these parties (b), it was not requisite in the notice. The doctrine in *Tindal v. Brown* not being denied, the defendant must have gathered the fact of dishonor from this letter, which is all that is requisite.


Cur. adv. vult.

TINDAL, C. J. now delivered judgment. The question in this case is, Whether the direction of Lord

(a) *Tanner v. Bean*, 4 B. & C. 312. overruling *Jones v. Morgan*, 2 Campb. 474.

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Tenterden to the jury — that the letter given in evidence at the trial, and set out upon the bill of exceptions, was not sufficient notice of the dishonour and non-payment of the bill, and that upon such evidence the jury ought to find a verdict for the defendants — was a proper direction or not? And we are of opinion that the direction was proper, and that the judgment which has been given for the defendants must be affirmed.

The notice of dishonour which is commonly substituted in this country, in the place of the formal protest, which is in other countries essential to enable the plaintiff to recover (a), most certainly does not require all the precision and formality which accompanied the regular protest for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount.

The allegation in the declaration is, that the bill has been presented to the acceptor, who has refused payment, whereof the defendant has had notice. Consequently, to satisfy that allegation, though no express form of words is necessary, the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonoured. Now, looking at the notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents.

Besides it is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiff means to rely on some legal excuse for the non-presentment. The present case is stronger against the sufficiency of the notice than that of *Hartley v. Case* (a), where there was at least an allegation that the bill *had become due*, which is not found here. This letter may

(a) *Pothier Traité du Contrat de Change*, Part I. c. 5. s. 2. Art. 1. § 5.

(b) 4 B. & C. 337.

not improbably have been written with a different intent, than that of giving notice of the dishonour to the indorsers, and may have been information that an action was about to be brought by the attorney, taking for granted that the notice of the bill's dishonour had been given in the ordinary way, before the bill was put into his hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice.

We therefore think judgment ought to be affirmed.

Judgment affirmed.

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WAKELING *against* WATSON.

May 2.

A RULE had been obtained to set aside a *subpœna ad respondendum* for being tested in the name of Sir W. Alexander, knight, instead of Lord Lyndhurst. Cause was now about to be shewn for the plaintiff, when the Court suggested that he should take a rule to amend the writ, in order that both rules might be disposed of at the same time.

On shewing for cause that the amendment in the writ had been made, the rule for setting aside the writ was

The teste of a writ, if irregular, in naming a late Chief Baron instead of the existing one, may be amended; a rule for setting it aside was discharged.

Discharged without costs (a).

(a) In *Williams v. Ball*, Exch. E. 1831. a motion to set aside a writ for a similar defect, was withdrawn on the Court intimating that the writ might be amended.

In *Morris v. Herbert*, 1 Pri. R. 245. a rule to set aside a writ of *quo minus* for being tested in the name of Sir A. M'Donald, instead of Sir A. Thompson, was made absolute with costs, on the ground that though the original writ was correct, the copy served was not a true copy of it. See *Anon.* 2 Chitt. R. 239.

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April 26.

ANONYMOUS.

A rule for judgment, as in case of a nonsuit, will not be made absolute while any thing remains due under an agreement between the parties to pay by instalments.

COLERIDGE had obtained a rule for judgment as in case of a non-suit, against which Sir *W. Owen* shewed cause for not proceeding to trial; that the parties had agreed for payment of the debt and costs by the defendant, by instalments; that though the time for payment had elapsed, an instalment of the costs remained due.

Rule Discharged with Costs.

April 27.

ANONYMOUS.

Requisites of notice of bail, where bail to sheriff justify as bail above.

NOTICE of justification of bail stated that the two persons seeking to justify were bail of the defendant to the sheriff. In fact, there were three defendants, and they had been bail for two of them.

BAYLEY, B.—It was clear, by the bail bond, who these persons seeking to justify were; therefore, I think the use of singular for the plural does not vitiate the notice.

The Bail justified.

April 29.

SMITH v. COOPER, a Prisoner.

The costs of one successful opposition to bail must, in Exchequer, be paid, before other bail can justify.

ON bail appearing to justify, *Chilton* applied for 5*l.* costs of a previous opposition at which the bail had been rejected.

BAYLEY, B. — In the King's Bench, after notice has been given of justifying a third set of bail, the plaintiff is entitled to costs before they can justify.

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The Master certified, that in this court, after one successful opposition, bail cannot justify on the second notice till 5*l.* has been paid for costs of that opposition.

This rule having been complied with, the bail justified.

In the Matter of the Estate of ANN VYVYAN.

April 27.

AMOS moved for an attachment against an executor for not delivering his account at the Legacy Duty Office.

Rule for attachment against an executor, for not delivering account at Legacy Duty Office, is *nisi* only.

A rule *nisi* was obtained for the executor to account, which was made absolute, no cause being shewn. There was an affidavit of the personal service of that rule, and that a person had searched the book at the Legacy Office, where such account ought to be entered, and that none was found there.

Per Curiam. — We think the rule for an attachment must not be absolute in the first instance, as the executor may have some excuse for not complying with the former rule. In the King's Bench only two rules for attachments are absolute in the first instance, one against the sheriff for not bringing in the body of the defendant, and the other against a party for not paying costs according to the master's allocatur (*a*).

Rule *nisi* granted, unless cause shewn to the contrary in eight days. No cause being shewn, it became absolute, and attachment issued.

April 30.

GOULD v. DAVIS.

A plaintiff and defendant settled an action for 25*l.* by the defendant giving a bill for 24*l.*, 19*l.* thereof being for the debt, and 5*l.* for the costs incurred, which, however, nearly amounted to 24*l.* The plaintiff's attorney was not a party to this arrangement. The bill being deposited in the hands of a third person, was ordered to be delivered up to the plaintiff's attorney, in satisfaction of his costs.

JERVIS had obtained a rule, calling on the plaintiff, the defendant, and one *Pollard*, to shew cause why they or one of them should not deliver to the plaintiff's attorney a bill of exchange for 24*l.* given by the defendant to the plaintiff, in satisfaction of his debt and costs in the action, and deposited in the hands of *Pollard* by consent of both. The affidavit stated that the action was brought to recover 25*l.*, and would have been tried at the last *Monmouth* assizes, but that after notice of trial given, briefs prepared, and witnesses subpoenaed, the defendant called on the plaintiff's attorney, and offered to pay him 23*l.* for the debt and costs. The latter declined accepting it without instructions from his client. The plaintiff and defendant, however, met afterwards on the same day, and agreed that the defendant should give a bill for 24*l.*; 19*l.* for the debt due to plaintiff, and 5*l.* for costs, to be placed in the hands of *Pollard*. It had been stated by the defendant that plaintiff was in very needy circumstances. The costs incurred were nearly equal to the amount of the bill. *Griffin v. Eyles* (a) was cited.

John Evans shewed cause.—It is true that a plaintiff and defendant may settle an action without intervention of the plaintiff's attorney, if no fraudulent intention to cheat him of his costs appear. *Chapman v. Haw.* (b) Now no such collusion appears here, express provision being made for costs, and no notice having been given to the defendant by the attorney not to settle with the plaintiff till his bill was paid. *Welsh v. Hole.* (c) The

(a) 1 Hen. Bla. 122.

(b) 1 Taunt. 341.

(c) Dougl. 238.

rule does not call on plaintiff or defendant to pay costs, but requires them and another person to deliver a document which is not in the possession or control of either. Had the defendant been a party to a fraud in depriving the plaintiff's attorney of his costs, the rule should have called on him to pay them. The plaintiff is here called on by rule to pay his attorney's bill, but his right course is by action. The attorney's lien never attached on this document in the hands of *Pollard*, nor is it indorsed.

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Jervis, in support of the rule.—No affidavit being filed on the other side, it is uncontradicted that the plaintiff was insolvent. Then the only course of his attorney to recover his costs was to proceed with the action, (a) or to obtain this rule. It is sworn that the costs incurred are larger than the amount of the bill given, and that the bill was given by the defendant for the express purpose of depriving the attorney of his costs. Now in *Chapman v. Haw* (b) the proposal to compromise came from the plaintiff, who swore he was at all times ready to pay the costs to his attorney, had application been made. *Turwin v. Gibson* (c) applies. There an executrix sought to distribute assets which were the fruits of a decree of the Court of Chancery to the bond creditors of her deceased husband, in the usual course of administration, but Lord *Hardwicke* said that a solicitor, in consideration of his trouble and money in disburse for his client, had a right to be paid out of the sum decreed to the administratrix, and had a lien on it before the bond creditors of the plaintiff. He added, that that was constantly the rule of that Court. That case was relied on in *Griffin v. Eyles*, (d) which establishes that an attorney has a lien for his bill on money levied by a sheriff, under an execution on a judg-

(a) See *Nelson v. Wilson*, 6 Bing. 568.

(b) 1 Taunt. 341.

(c) 3 Atk. 720. 727.

(d) 1 H. Bls. 122.

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ment recovered by his client, and is entitled to have it paid over, though the defendant has given the sheriff notice to retain the money, and that a motion would be made to set aside the judgment for irregularity. In *Welsh v. Hole* the defendant compromised with plaintiff after long imprisonment, but here the bill is the fruit of the action, which, had it come to the attorney's hands, might have been stopped by him *in transitu* for payment of his costs. (a) Notice has been given to the holder not to deliver up the bill to the plaintiff. He also mentioned *Wilkins v. Carmichael*. (b)

BAYLEY, B. (c)—This rule must be made absolute. Where there is any collusion between the plaintiff and defendant, in order to deprive the attorney of his costs, he may go on with the action, and compel the defendant to pay them to him. (d) Here a settlement took place between the plaintiff and defendant, at a time when they knew that the plaintiff's attorney had a claim for costs. Now the plaintiff has only a right to recover his debt, and the costs ought to be paid into the hands of the attorney. But the security here given is not for the debt alone, but for costs also. The plaintiff is sworn to be in needy circumstances. The security of the bill is given under pressure of an action. Who is entitled to the benefit of it? If a judgment had been procured through the medium of the attorney, he would have a lien on it, and would receive the money, that out of it he might reimburse himself. Here, instead of proceeding to judgment, a bill is given, partly as a security for

(a) Tidd, 9th ed. 337.

(b) Dougl. 104.

(c) Lord Lyndhurst was absent in the Court of Chancery.

(d) But mere suspicion of collusion will not suffice; it must be clearly established, or the attorney cannot proceed to trial for his costs. *Nelson v. Wilson*, 6 Bing. 568. where the attorney having obtained a verdict, the Court of C. P. set it aside, and stayed the proceedings without costs.

the debt due, and partly in satisfaction of the costs due to the plaintiff's attorney. He has a right to the possession of the bill, to pay himself what is due to him in respect of the action, and to be trustee for the plaintiff for the difference, if any. Nor will this alter the situation in which the parties are placed, for the plaintiff having agreed to discharge the defendant for 24*l.* he will be discharged accordingly.

1831.

GOULD
v.
DAVIS.

GARROW, B.—The plaintiff, on whom this will operate, was liable to pay costs to his attorney, though he has here, by his own act, prevented him from receiving them. If an attorney was in all cases driven to refuse proceeding in a suit till he received a deposit, on account of its expenses, it would be a great inconvenience to the majority of suitors. In most cases, an action is proceeded in by the attorney, in the just expectation that the costs incurred will be repaid into his own hands.

BOLLAND, B.—In *Turwin v. Gibson*, (a) the proceeds of a decree were in the hands of the executrix, but an order was made on her that the attorney's demand should be paid before that of any bond creditor. Upon the authority of that case, I think the rule should be absolute.

Rule absolute.

THE KING *against* WRANGHAM.

May 3.

D. POLLOCK, on behalf of the assignee of *Wrangham*, an insolvent, moved to set aside an extent An extent lies against the insolvent agent of a fire insurance company, where it is found on inquisition that he has received a sum due to the crown for insurance duties, though the company be also liable to the crown.

(a) 3 Atk. 720. 727.

1831.

 THE KING
 v.
 WRANGHAM.

issued against him. The insolvent acted as the *Lowth* agent of the county fire insurance office, and, as such, had collected 177*l.* in respect of premiums and duties, for which he was bound by bond duly to account to his employers. A debt to the crown for duties to this amount being found due on inquisition, the usual affidavits were also made, stating that the defendant owed 177*l.* to the crown, which was in danger of loss; and the extent thereupon issued.

D. Pollock contended that the insolvent's estate ought to be divided among his creditors, including the county fire office, who were primarily liable to the crown for the duties received. There was no privity between the crown and the insolvent.

Shepherd, for the crown.—The insolvent having in his hands the property of the crown, is accountable for it as immediate debtor to the crown.—(He was then stopped by the Court.)

LORD LYNTHURST, C. B.—The crown only claims that money which, being due to it, came immediately to the hands of the insolvent *Wrangham*. Whoever receives money belonging to or due on account of the crown, is an immediate debtor to it. Thus if the insolvent had not received this money, the creditors would have been in the same situation.

BAYLEY, B.—The question is, whether the crown may treat *Wrangham* as an immediate debtor or not. Now except for the wrongful act of his spending the money which he ought to have retained, it would have been ready in his hands. Then why is the insolvent to divide among his general creditors the duties belonging to the crown, and why should his assignees stand in a better situation than himself? If the county fire office had become bankrupt, could not the crown have

issued an immediate extent against the defendant, to secure the duties received by him as their agent?

1831.

THE KING
v.
WRANGHAM.

GARROW, B.—Though *Wrangham* was to account for the duties to the fire office, still they belonged to the crown. The fiat was granted on an inquisition finding the defendant indebted to the crown, as well as on the usual affidavits.

BOLLAND, B.—The inquisition found the amount of duties received by the defendant to be 177*l*.

Rule refused.

RE THOMAS WETTON.

May 6.

WETTON being in custody of the sheriff of *Staffordshire*, on an attachment issuing out of this court, a true bill was found against him in *Middlesex*, for perjury committed in that county.

Removal of prisoner for contempt to take his trial for perjury in another county.

Whitcombe moved for a writ of habeas corpus, directing the gaoler of his Majesty's gaol of the county of *Stafford* to have the body of *Thomas Wetton* at "the next general sessions of oyer and terminer of our Lord the King, to be holden in and for the county of *Middlesex*, at the sessions house for the said county, at *Clerkenwell* in the said county, on the — instant."

Notice of motion having been given to the defendant *Wetton*, and the gaoler of *Stafford*,

BOLLAND, B. (a) granted the writ.

(a) The only Judge in Court.

1831.

May 9.

DOCKETT *against* REED.

After a rule for judgment as in case of a nonsuit has been discharged, without imposing terms as to costs, a rule will be granted for the costs of not proceeding to trial.

THE plaintiff had not proceeded to trial in pursuance of notice.

Erle having obtained a rule for judgment as in case of a nonsuit, now moved for a rule for costs for not proceeding to trial. The Master certified that two rules were requisite, but that the rule for the costs of the day should be moved first. (a)

LORD LYNTHURST, C. B.—If the rule for judgment as in case of a nonsuit is discharged, (b) we shall then be in a condition to consider whether the other rule should be granted.

BAYLEY, B.—There is no reason why the rule for judgment as in case of a nonsuit should not be disposed of before granting the other rule. The first is in fact a motion for a peremptory undertaking; but if discharged *with costs*, then the defendant ought to pay the costs of the other rule, which in that case he would have improperly obtained. But if the rule for judgment as in case of a nonsuit is made absolute, the defendant is, as a matter of course, entitled by statute (c) to costs of the cause, including those of the day.

Coleridge having given a peremptory undertaking to try at the next assizes, the

(a) See *Morgan v. Bidgood*, 1 Pri. R. 61. *Fisher v. Hodgkinson*, 2 Pri. R. 90. Wightw. 65.

(b) See *Hullock on Costs*, 404. 2 W. Bla. 1093.

(c) See 14 G. 2. c. 17.

Rule for judgment as in case of a nonsuit was discharged, without any direction as to costs.

The rule for costs for not proceeding to trial was then granted. (a)

(a) This rule being absolute in the first instance, the costs prayed followed of course, being payable immediately on taxation. See 1 Pri. R. 61. note. 1 D. & R. 165. while the other costs became costs in the cause.

1839.

DOCKETT
v.
REED.

RISDALE *against* KELLY.

May 9.

BALL had obtained a rule to set aside a judgment signed for want of a plea, for irregularity, with costs. The judgment had been signed after plea pleaded and filed.

The declaration was in debt for 60*l.* being the aggregate of six sums of 10*l.* alleged to be due in the several counts. The plea was, that defendant did not owe the said sum "of ten pounds" above demanded.

Jervis and *Temple* shewed cause.—The plea is a nullity, being pleaded to the whole declaration, and not confined to any particular count. *M'Donnell v. M'Donnell*. (b) If the plaintiff had demurred, the defendant would have obtained the time, which was his object.

A plea in debt, that defendant does not owe the said sum "of ten pounds" above demanded, (the aggregate sum demanded being 60*l.*) will not authorize the signing judgment for want of a plea, for the amount may be rejected as surplusage.

Ball, in support of the rule.—This plea sufficiently meets the declaration, for the particular sum mentioned may be rejected as surplusage. *Atwood v. Bonacich*. (c) There issue having been joined on a similar plea, the Court refused a rule for permitting the plaintiff to sign judgment as for want of a plea, saying that he might withdraw his similiter and demur, though the inclination of Lord *Tenterden's* opinion was, that the declaration

(b) 3 B. & P. 174.

(c) 1 D. & R. 473.

1830.

RISDALE
v.
KELLY.

was sufficiently covered by the averment "that the defendant did not owe the money above demanded," and that the words "of ten pounds" might be rejected as surplusage.

LORD LYNDHURST, C. B.—I perfectly assent to the proposition, that the precise amount named in the plea may be rejected as surplusage.

BAYLEY, B.—Each count here claims 10*l.* to be due. Then if the defendant pleads he does not owe the sum of 10*l.* above demanded, will that plea be so inapplicable to each count as to be a nullity, thereby entitling the plaintiff to sign judgment for want of any plea? Now if the words "of ten pounds" can be rejected as surplusage, the plea is sufficient. The question in *M' Donnell v. M' Donnell* (c) was, whether a similar plea was issuable within the terms of a judge's order to plead issuably, and though the Court held that point in the negative, they did not treat the plea as a nullity. For a plea to the merits, which this clearly is, cannot, though bad, be treated as null. The words "of ten pounds" are obviously inapplicable, and may be rejected.

The other Barons (*Garrow* and *Bolland*) concurred.

Rule absolute with costs, defendant undertaking to bring no action.

Mr. Baron *Vaughan* was absent during this term from indisposition.

(a) 3 B. & P. 174.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED IN

THE COURT OF EXCHEQUER,

IN

Trinity Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

SMITH and others v. CRAVEN and Another.

May 25.

ASSUMPSIT for money had and received, and lent and advanced. Defendant *Craven* pleaded the general issue, and *Thompson* suffered judgment to go by default. The cause was referred to a barrister, whose award, finding the following facts, was ordered by the Court to be made a special case.

*A. (Whar-
ton) B.
(Thompson)
and C. (Cra-
ven)* being
separate trad-
ers, agreed to
a joint specu-
lation in im-
porting corn.

The agent for buying the corn abroad knew that the speculation was on the joint account of *A.*, *B.*, and *C.*, and was to consign to *A.*, drawing on him at two or three months. Corn was bought, and bills for the value drawn on and accepted by *A.*, payable at a banker's in *London*, the correspondents of the plaintiffs, who were bankers at *Hull*. *A.* had a banking account with the latter, who, being in the habit of paying his acceptances at the house of their *London* correspondents, paid the above among other acceptances, not then knowing of the joint speculation of *A.*, *B.*, and *C.* *A.*, by way of part security to the plaintiffs, indorsed to them two accommodation bills, drawn by himself on *B.* These were unpaid, and *A.* and *B.* became bankrupts. *C.* had contributed his third of the purchase, but did not appear to have known from what source *A.* obtained his funds for that purpose.—Held, that the *Hull* bankers could not recover against *C.*, as for money lent or had and received, the amount of the bills drawn by *A.* on *B.*, though they had given *A.* credit for them in his account, as partly liquidating their advances to pay for the corn bought for *A.*, *B.*, and *C.* at their joint profit or loss.

1831.

SMITH
and Others
v.
CRAVEN
and
Another.

Plaintiffs were bankers at *Hull*. On 11th October 1828, the defendants, with one *Wharton*, who were severally merchants in *Hull*, carrying on business separately on their own account, and in their own names, engaged in a joint speculation for the purchase and importation of corn from the *Baltic* into the port of *Hull*. For this purpose they employed *Rodbartus*, a clerk of *Wharton's*, as their agent, whom they dispatched to *Lubeck*. He purchased several cargoes of corn, which were sent to *Hull*, and consigned to *Wharton*. By letter from *Wharton*, dated 11th October 1828, *Rodbartus* was instructed that he was to draw on him, *Wharton*, for what monies he might want, payable in *London*, at two or three months, as most convenient. In this letter, *Wharton* said "You will understand this speculation to be on the joint account of *Wharton*, *Thompson*, and *Craven*," which was the fact.

Between 27th October and 22d November 1828, several bills or drafts, amounting altogether to £3696 17s. 8d. were drawn by *Rodbartus* at *Lubeck*, and *Julien Brothers*, at *Copenhagen*, on *Wharton*, on account of cargoes of corn consigned to *Wharton*, and were accepted by him, payable at Messrs. *Smith*, *Payne*, and Co. agents of plaintiffs in *London*, all which bills were duly honoured by plaintiffs, on *Wharton's* account, and by his instructions.

No partnership fund was raised for the speculation, and it was agreed that the parties were to meet the expenses in thirds. Defendant *Craven* was always ready with his proportion of the advances, which he paid to *Wharton* and *Thompson*, who had the management of the speculation, the corn being consigned to *Wharton*, and *Thompson* acting as salesman. *Craven's* first contribution was 100*l.*, on 28th November 1828. On 3d January 1829, there was an excess of bills, and other charges,

payable on account of the joint speculation, above the amount of monies in hand, and on 5th, 7th, and 8th *January*, *Craven* paid several sums into *Wharton's* hands, as contributions required from him on account. On 21st *February* 1829, the excess above the actual receipts on account of the sales was 2208*l.* 11*s.* 3*d.* The advances made by *Craven*, at the same date, to *Wharton*, on account of the speculation, amounted to 796*l.* 10*s.* Before, and up to the close of the speculation, *Wharton* kept a separate banking account with plaintiffs, in his own name. They had no knowledge of the joint speculation, and were in the habit of paying, on his account, through *Smith, Payne, and Co.* their London correspondents, bills drawn upon him, *Wharton*, by foreign merchants and others, and by him accepted payable at *Smith, Payne and Smith's.*

In the course of the joint speculation, *Wharton* delivered to the plaintiffs several accounts of acceptances, with instructions to them to honour the same. The first was in these terms :

"Hull, 24th December 1828.

Accepted payable at Messrs. *Smith, Payne, and Smith.*
C. J. Rodbartus's draft, dated *Lubeck*, 27th
October, at two months, due 30th *Decem-*
ber. - - - - £300 0 0

*Matthew Smith's draft, dated Hull,
2d September, at four months, due
5th January 1829, - - 184 2 0*

Cr.	£375	0	0		
	200	0	0		
	<hr/>				
	£575	0	0		

					<hr/>
					£484 2 0
				<i>Thomas Wharton.</i>	

1831.
SMITH
and Others
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CRAVEN
and
Another.

1831.

SMITH
and Others
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CRAVEN
and
Another.

At the same time *Wharton* paid in bills to the amount of 575*l.* and the sums of 484*l.* 2*s.* 0*d.* and 575*l.* were passed to the debit and credit respectively, of *Wharton's* account with the plaintiffs.

On 2d *January*, *Wharton* delivered to plaintiffs an account of acceptances, with instructions, in the following terms :

" *Hull*, *January* 2, 1829.

Accepted payable at Messrs. *Smith, Payne, and Smith's*.

C. F. Rodbartus's three drafts, dated *Lubeck*,
3d *November*, at two months, due 6th *January*, say

1 draft for	-	-	£350	0	0
1 do.	-	-	250	0	0
1 do.	-	-	300	0	0

Munster, Grafe, and Co.'s draft,

dated *Hambro'*, 7th *November*

at two months, due 10th *Jan.* 139 11 5

Cr.

Cash	£200	0	0	£1039	11	5
Bill	500	0	0			
Do.	427	8	3			

Thomas Wharton.

£1127 8 3

At the same time *Wharton* paid in bills and cash to the amount of 1127*l.* 8*s.* 3*d.* and the sums of 1039*l.* 11*s.* 5*d.* and 1127*l.* 8*s.* 3*d.* which were passed to the debit and credit respectively of *Wharton's* account with the plaintiffs.

On 9th *January*, *Wharton* delivered to plaintiffs an account of acceptances, with instructions to honour same, in the following terms :

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SMITH
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and
Another.

“ *Hull*, 9th *January* 1829.

Accepted payable at Messrs. *Smith, Payne, and Smith's*,
C. F. Rodbartus, his drafts, dated
Lubeck, 10th *November*,

	1 for - -	£275 0 0
Cr. £176 0 7	1 for - -	325 0 0
26 10 0	<i>Munster, Grafe, and Co.</i>	
33 5 0	<i>Hambro'</i> , their draft,	
50 0 0	14th <i>November</i> , two	
25 0 0	months, due 17th	
35 0 0	<i>January</i> , - -	289 0 0
100 0 0		
100 0 0		£889 0 0
105 0 0		
105 0 0		
35 0 0	<i>Thomas Wharton.</i>	

£890 15 7

At the same time *Wharton* delivered the above, he also paid in bills and cash, value 890*l.* 15*s.* 7*d.* and both sums were in like manner passed to account.

On 15th *January* 1829 *Wharton*, in like manner, delivered to plaintiffs an account of other acceptances, with like instructions :

1831.

SMITH
and Othersv.
CRAVEN
and
Another.

“Hull, 16th January 1829.

Accepted payable at Messrs. *Smith, Payne, and Smith's**Tanner and Beckwith's* draft, dated18th *September*, at four months,due 21st *January*, £173 10 1*C. F. Rodbartus's* fivedrafts, dated *Lubeck*,17th *November*, at twomonths, due 20th *Jan.*

Cr.		1 for	£28	0	0	} 884 12 8
Bill	£191 18 0	1 for	260	0	0	
	471 18 0	1 for	240	0	0	
Cash	300 0 0	1 for	200	0	0	
	60 2 0	1 for	156	12	8	
	100 10 0	<i>John S. Munn, Lubeck,</i>				
		his draft, dated 17th				
	£1124 0 0	<i>November</i> , two months,				
		due 20th <i>Jan.</i>				- 68 8 10

Thomas Wharton. £1126 11 7

And at the same time *Wharton* paid in bills and cash value 1124*l.* and both were, in like manner, passed to account.

On 21st *February* 1829, *Wharton*, in like manner, delivered to plaintiffs an account of other acceptances, with like instructions :

“Hull, 21st February 1829.

Accepted payable at Messrs. *Smith, Payne, and Smith's**Julien, Brothers, Copenhagen*, their twodrafts, dated 22d *November*, at threemonths, due 25th *February*,

Cr.		1 for	-	-	£600	0	0
	£100 0 0	1 for	-	-	412	5	0
	300 0 0						
	471 15 0						
	198 14 0						
					£1012	5	0
	£1070 9 0	<i>Thomas Wharton.</i>					

And on this last occasion, *Wharton* paid in bills and cash, value 1070*l.* 9*s.* and both were, in like manner, passed to the account.

In all these instances, except the last, there were other acceptances included in the instructions for honour, besides those relating to the corn speculation.

All the acceptances made payable at *Smith, Payne* and *Smith's*, were duly honoured by the plaintiffs on *Wharton's* account.

At the time of the above transaction, plaintiffs believed the above acceptances to be *Wharton's* individual concern.

In the payment of the 1127*l.* 8*s.* 3*d.* made by *Wharton* to the plaintiffs on 2d *January* 1829, was included a bill, drawn on and accepted by defendant *Thompson* for 427*l.* 8*s.* 3*d.* due 29th *March*; and in the payment of 1070*l.* 9*s.*, made by *Wharton* to plaintiffs 21st *February*, 1829, was included a similar bill for 198*l.* 14*s.* These two bills, making together 626*l.* 2*s.* 3*d.* were entered as bills to their full amount by the plaintiffs, who did not negotiate them, and in whose hands they remained unpaid. Both were drawn by *Wharton* on *Thompson*, being accommodation bills manufactured between them without *Craven's* privity or authority, and having no other reference to the joint concern than so far as it might be presumed to be for the purpose of enabling *Wharton* or *Thompson* to raise money to pay their respective contributions. Plaintiffs did not know these were accommodation bills.

On 11th *April*, 1829, *Thompson* became bankrupt, and about the same time *Wharton* absconded to *America* and also became bankrupt.

Since these bankruptcies, defendant *Craven*, including his previous payment towards the joint account, amounting to 796*l.* 10*s.* was obliged to pay 2,900*l.* on that transaction.

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SMITH
and Others
v.
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and Others
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and
Another.

The whole cargoes of corn came to the hands of *Wharton*, *Thompson*, or their assignees, and were sold by them, except one cargo uninsured and lost at sea.

The plaintiffs first discovered the corn speculation between *Wharton*, *Thompson* and *Craven* under the bankruptcy of *Wharton*.

Besides the sum of 626*l.* 2*s.* 3*d.* for which the action was brought, *Wharton* continued indebted to plaintiffs in 324*l.* 14*s.* 9*d.*

Up to 21st *February*, 1829, the amount of advances by plaintiffs to *Wharton*, which can be traced to the joint speculation, was 3,816*l.* 13*s.* 2*d.*, and the amount of similar receipts by plaintiffs from *Wharton* up to the same date, exclusive of the two bills drawn by *Wharton* on *Thompson*, as above mentioned, was 3070*l.* 7*s.* 0*d.*

The case also set out *Wharton's* banking account with the plaintiffs, stating the above acceptances, and payments *per contrà* in the usual debtor and creditor manner.

In the event of the Court being of opinion that the plaintiffs were entitled to recover, the arbitrator awarded the defendant *Craven* to pay the plaintiffs 626*l.* 2*s.* 3*d.* with all costs of the reference and award; but if their judgment should be for the defendant, he directed that the plaintiffs should pay the defendant *Craven* the costs of the reference and award.

R. C. Hildyard for plaintiffs.—The plaintiffs seek to charge the defendant *Craven* with a sum of 626*l.* 2*s.* 3*d.* in respect of his share of the profit and loss in a joint purchase of corn by him with *Wharton* and *Thompson*. The above sum is the amount of two bills drawn by *Wharton* on *Thompson*, and accepted by him, for which the plaintiffs gave *Wharton* credit (a), as a part security

(a) See *De la Chaumette v. Bank of England*, 9 B. & C. 216.

for their advances to enable him to take up *Rodbartus's* drafts; and stands part of a cash balance against him in their books. They for their security required and obtained collateral acceptances from *Wharton*, which were not paid. An agent was employed by the partners to buy corn, and as no partnership fund existed, bills were necessarily drawn in favor of the sellers, to be answered by the proceeds of the corn. *Rodbartus* was expressly instructed to draw them on *Wharton*, payable in *London*, being at the same time informed on whose account the speculation was made. That connects his drafts or bills with the joint speculation. In the *South Carolina Bank v. Case and Others (a)*, though *Clough*, the partner in *America*, was not only without authority from his partners in *England* to indorse bills of the description on which the holders claimed a dividend, but in so doing violated their positive instructions on that subject, the Court held that *Clough's* indorsement bound the English partners.—[*Bayley B.* The King's Bench there held that for the purposes of business in *America*, as carried on there by *Clough*, for the joint benefit of himself and his two partners in *Europe*, he *ex necessitate* had a virtual authority to pledge the partnership firm in order to carry on the concern; and they thought that *Clough* was the whole firm in *America* as to third persons, whatever violation of agreement had taken place as between him and his partners.]—In this case, the partnership had another name in *England*. *Wharton's* acceptances of *Rodbartus's* bills were for that purpose the acceptances of the partnership, and the plaintiff's advances to take them up were monies lent and advanced to the use of the partners for their joint benefit. In *Denton and Others v. Rodie and Another (a)*, *Clough*, a partner in a *Liverpool* house, went to *America* to get consignments

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Another.

(a) 8 B. & C. 427; see 10 B. & C. 293.

(b) 3 Campb. 493.

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and
Another.

for the partnership, and in the course of that undertaking drew bills on the *Liverpool* firm in his own name, for which he received value in *America*. His partners recognized these acts by paying bills similarly drawn, till they became bankrupt. Lord *Ellenborough* held the transaction to be a loan rather than a discount, and that as the money was paid to him in *America*, in pursuance of the partnership authority, the lenders were entitled to recover as for money lent to, or had and received by the partnership.—[*Bayley* B. In that case, it was also considered, that an authority to borrow money existed, the course of dealing which took place abroad having been adopted by the partners at home; but in this case, the plaintiffs, *Smith* and Co. are one degree removed from the joint transaction of purchase, they being agents for only one of the buyers, and not consulant of the joint transaction till after its conclusion. Can they be said to have paid money for the use of all the partners, at the joint instance of all?—The defendants adopted *Wharton's* acts, in furtherance of a joint speculation, in which the defendants were his partners. It is not stated that *Craven* was ignorant of the advances to *Wharton*. Besides, these advances prevented the partnership from being sued by the seller for the value of the corn.

Coltman, contra, was stopped by the Court.

LORD LYNDHURST C. B.—It is distinctly stated that the defendant *Craven* contributed his share of the money required for the joint speculation when called on, but nothing appears from which we can infer that he knew by what means the other two-thirds to be contributed by his partners, *Wharton* and *Thompson*, were raised. Had *Craven* any reason to consider how their shares were furnished, or to suppose that they were not supplied by their own funds? Then, as the business

was entirely conducted by them, he might naturally conclude that *Wharton*, to whom the corn was consigned, raised his share of the purchase-money on the security of the proceeds of the sales, so as to provide for the payment of the agent's drafts which did not become due till a future period. *Wharton* did in fact raise money for that purpose, on his own credit, at his banker's, in the manner stated. But nothing shews any authority from *Craven* so to obtain it, or any knowledge of his that it was so acquired.

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 and Others
 v.
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 and
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BAYLEY B. —If my agent misapplies money, raised by my authority to answer the purposes of his agency, and then borrows other money to answer those purposes, can I be liable to the lender? If this was a claim by the seller of the corn, he might doubtless have made all the partners liable (*a*). This, however, is a claim by third persons, who, as between these parties, are to be the mere hand by which the money is to be advanced. The borrower, *Wharton*, having given collateral security to the plaintiffs for their advances, the money is lent to him, by him paid over to the agent, or applied to take up bills drawn by him for the partnership purchases. But the debt thus accruing to the plaintiffs is the individual debt of the single principal *Wharton*. He is the only person trusted; on his own account and credit alone are the advances made by the plaintiffs; and they are not deluded by the prospect of any partnership security held out to them by him. While the bills were drawn on *Wharton* and honoured, *Craven* might reasonably take it for granted that they were defrayed by *Wharton's* own funds. It would be very unjust, if after advances thus made to *Wharton*, the plaintiffs should, at a distant period, be allowed to say, "We advanced money to take

(*a*) See *Cothay and others v. Fennell and others*, 10 B. & C. 671.

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and
Another.

up bills drawn on *Wharton*, and though we lent the money on *Wharton's* credit only, still as we now find that he applied it to pay a debt for which you were jointly liable with him, we shall hold you liable to us for the loan." No facts are stated, shewing any authority whatever from *Craven* to *Wharton* to borrow money from the plaintiffs, nor is one partner liable for a loan to another, unless that other had authority, express or implied from his partner to contract the debt. It is not sufficient to say that the firm of *Wharton, Thompson, and Craven*, was relieved by the payment of their acceptances by the plaintiffs' money; for the payment of their debt, except at their joint instance, did not, in point of law, relieve them from liability.

The other Barons concurred.

Judgment for the defendant *Craven*.

Coltman, for the defendant, obtained the costs of the special case, in addition to those given by the award.

May 24.

BROWN against SHUKER and Others.

In debt
against an
heir on the
bond of an
ancestor,
riens per de-

scend before, at, or since the exhibiting the bill, was pleaded. Plaintiff replied, that before the commencement of the suit defendant had lands by descent. The plaintiff had a verdict, but the jury did not inquire of the value of the lands descended. Held, that the replication provided by stat. 3 W. & M. c. 14. s. 6. having been adopted, the jury who tried the cause should have inquired the value of the lands descended; and a *venire de novo* was awarded.

Quare, whether 3 W. & M. c. 14. s. 6. is general in its operation, or confined to cases of alienation before action brought; or whether that statute continues to a plaintiff his common-law right to a general judgment on false plea of *riens per descent* pleaded?

A BOND, dated 24th March 1824, had been given by *Edward Edwards* for himself, his heirs, &c., to the plaintiff, in a penalty of 2200*l.*, conditioned to perform

the covenants in an indenture of mortgage of the same date between the obligor of the one part, and the plaintiff of the other part, for securing 1100*l.* to the plaintiff. This was an action of debt by the obligee against *W. Shuker* and *Elizabeth* his wife, *T. Plimley* and *Mary* his wife, *T. Evans* and *Catherine* his wife, being co-heiresses of the obligor, their father, who died before 16th July 1830 (a), possessed of certain lands. The defendants joined in all the pleas as far as the sixth inclusive.

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1st, as to the bond *non est factum* of *Edward Edwards*.

2d, as to the indenture of mortgage, same plea.

3d, That the bond was obtained from *Edward Edwards*, since deceased, by the fraud, coyn, and collusion of the plaintiff and *T. Y.* his attorney, who represented to *Edward Edwards* that the 1100*l.* had been previously paid, and that *Edward Edwards*, believing such misrepresentation, signed the deeds, whereas in truth it had not been paid, nor was any part thereof ever after paid to *Edward Edwards* as for his use, or had or received by him.

4th, That the bond was obtained by fraud, omitting the statement of the particular misrepresentation.

5th, As to the indenture of mortgage, same plea as 3d.

6th, As to the indenture of mortgage, same plea as 4th.

7th plea, by *W. Shuker* and *E.* his wife, That they ought not to be charged with the said debts, because they say that they have not, nor has either of them, nor had they, nor had either of them, *at the time of exhibiting the bill of the said plaintiff in this behalf, nor at any time before or since*, any lands, tenements, or here-

(a) 3 W. & M. c. 14. is repealed by 11 G. 4. and 1 W. 4. c. 47. except as to estates of persons who died before the passing the act, viz. before 16th July, 1830.

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ditaments, by descent from the said *Edward Edwards*, in fee simple.—Verification.—Wherefore they pray judgment, if they the said *W. S.* and *E.* his wife, in right of the said *E.* as co-heiress of the said *E. E.* deceased, or either of them, ought to be charged with the debt aforesaid, by virtue of the supposed writing obligatory in the second declaration mentioned.

8th, Same plea by *T. Plimley* and *M.* his wife.

9th, Same plea by *T. Evans* and *C.* his wife.

Similiter to 2d plea. Replications to 3d, 4th, 5th, and 6th pleas, that the bond and indenture were fairly obtained, concluding to the country.

To 7th plea, That the said *E.*, after the death of the said *Edward Edwards*, and before the commencement of this suit, to wit, on the 1st day of June 1830, had divers lands and tenements in fee simple, by descent from the said *E. E.*, to wit, at, &c. (a)—Verification, and prayer of judgment for debt and damages. Same replications to 8th and 9th pleas. Issues thereon.

At the last assizes for *Salop*, the plaintiff had a verdict for 1100*l.*, but the jury did not inquire of the value of the lands descended, pursuant to 3 W. and M. c. 14. sec. 6.

R. V. Richards had obtained a rule in Easter Term to restrain the plaintiff from issuing execution except against the lands descended, and to stay proceedings, on payment of costs, but abandoned it, and afterwards obtained a rule for restraining the plaintiff from issuing execution till a jury had inquired of the value of the land descended, according to the statute. He cited

(b) Thus omitting the words "wherewith they might have satisfied the said plaintiff the debt aforesaid." But see 2 Saund. 8. a. note. *Redshaw v. Heather*, Cro. El. 354.

3 W. & M. c. 14. s. 5. & 6. (a) He contended that the plaintiff, who replies according to the statute, is not entitled to general judgment as at common law, but can only have a special judgment to the value of the land sold as found by the jury, be it what it may (b). If the jury neglect to find the value, a repleader or *venire de novo* will be awarded. *Jeffry v. Barrow* (c). Here

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(a) Only in force as to persons who died before 16th July, 1830. 11 G. 4. and 1 W. 4. c. 47.; re-enacted, id. s. 6. & s. 7. with similar provisions for actions of covenant against heirs, in order to enforce their ancestors' covenants.

Stat. 3 W. & M. c. 14. s. 5. after reciting "whereas several persons being heirs at law, to avoid the payment of such just debts as in regard of the lands, tenements, and hereditaments descending to them they have by law been liable to pay, have sold, aliened, or made over such lands, &c. before any process was or could be issued out against them," Enacts, "That in all cases where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, &c. descending to him, and shall sell, aliene, or make over the same, before any action brought or process sued out against him, that such heir at law shall be answerable for such debt or debts in an action or actions of debt, to the value of the said land so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, &c. bond fide aliened before the action brought shall not be liable to such execution.

Section 6. Provided always and be it further enacted, That where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him, anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor, before the original writ brought or bill filed, and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or nil dicit, it shall be for the debt and damages, without any writ to inquire of the lands, &c. descended.

(b) *Redshaw v. Hesther*, Carth. 354. Comb. 344. 5 Mod. 119, 123. S. C.

(c) 10 Mod. 18, 19.

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the plaintiff has replied under the statute 3 W. & M. c. 14. s. 6. (a), but the jury have not found the value of the lands descended.

Jervis and *Curwood* now shewed cause. — The plea of *riens per descent* is a false plea within the knowledge of the heirs who severally plead it. The proper judgment therefore is not special in respect of the lands descended only, but general to recover the debt, for the action is in the *debet*, and not in the *detinet* only, the heirs being *primâ facie* supposed to have assets to the value of the lands descended (b). — [*Bayley* B. As a defendant could only plead one plea at the time of passing 3 W. & M. c. 14., this record may perhaps be to be considered as if *riens per descent* were the only plea; for if the defendant is found liable on that, he will be also liable on the other pleas found against him. —] Then has 3 W. & M. c. 14. so altered the common law as to exempt the heir from the consequences of that false plea, and to make it imperative on the jury to find the value of the lands descended according to section 6. ? Section 3. recognizes the common law liability of the heir to a general judgment in case of a false plea, and before section 6. it seems that the jury could not, after finding against the heir on the issue of *riens per descent*, enquire the value of the lands descended, that being the effect of a special judgment (c). The object of the act was to give that remedy at law against an heir *quoad* lands descended and aliened by him before action brought, which could then only be had in equity. *Coleman v. Winch* (d). Sections 5. and 6. must be taken together,

(a) 2 Saund. 8. note a.

(b) *Dyer*, 149. a. Cases collected Bar. Abr. tit. Heir and Ancestor (H.) 14 Vin. Ab. same title (C.) pl. 1, 2, 3, 8. 9. 1 P. Wms. 777.

(c) See *Eveatt v. Sutcliffe*, Roll. R. 234. 1 Mod. 3. *Snelgrove v. Bosvill*, 2 Ro. Ab. 71. E. 1652. *Mathews v. Lee*, Barnes, 444. 14 Vin. 243.

(d) *Per Lord Macclisfield*, 1 P. Wms. 777.

and shew that the inquiry must be of lands descended and aliened before action brought. Then what jury shall so inquire? The statute 3 W. & M. has not altered the law on false plea pleaded. — [Bayley B. At that time no second plea could be pleaded. Is there any case before the statute where *riens per descent* was pleaded and found a false plea, but a qualified or special judgment only was given? —] *Evet v. Sutcliffe Mich.* 13 Jac. (a) shews, that at common law the quantity of assets, i. e. of lands descended, was not material to be found in debt against an heir on the bond of his ancestor after *riens per descent* found against him, though it might be in an action against an executor, (40 E. 3. 15.) and a general judgment was there sustained, nor after similar verdict on this pleading could the Court give a special judgment, except by consent of the plaintiff, *Allen v. Holden* (b), relied on by Lord Holt in *Smith v. Angel* (c), decided since 3 W. & M. c. 14. — [Bayley B. The plea in *Smith v. Angel* was at common law, confessing some assets, viz. a reversion descended, but alleging them not to be in possession, and pleading an outstanding lease in stay of the plaintiff's execution. The plea being held altogether null and false, the judgment there against the heir was general.] (d) The judgment being always special in these cases, it would sometimes be advantageous to the bond creditor to have a special judgment, viz., of all the lands descended, (which

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(a) Roll. R. 234. 14 Vin. 241. S. C.

(b) 2 Rol. Abr. 71. pl. 8, 9. A. D. 1651.

(c) 2 Ld. Ray. 786. 7 Mod. 40. S. C. Trin. 1 An.

(d) If the latter part of 3 W. & M. c. 14. s. 6. is (as it seems to be) general, applying to all heirs, then the judgment in *Smith v. Angel* being against the heir on demurrer, must have been general. See that section. And it seems the better opinion that it would have been also general at common law. Besides, after the judgment on demurrer, the action seemed confessed "without confessing the (real) assets descended." See that section, and 7 Mod. 44. S. C.

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might be all the heir had) instead of a general judgment, which would only give him a moiety of all the heir's land; plaintiffs have therefore been permitted to suggest on the record that the heir has particular lands by descent, and to pray execution of the whole of them. (a)

It is true that in *annuity* for arrears of an annuity granted by the ancestor, where *non est factum* was found against the heir, that was held to be not such a false plea as made the plaintiff's consent to a special judgment necessary, *Frank v. Stukeley* (b), in order to save the heir from a general judgment of a moiety of all his lands (c). Though *Clothworthy v. Clothworthy* (d) is cited in 2 Williams's Saunders (e) as an authority for the same law, it was decided on another point (f).

If the statute W. & M. is not imperative on the plaintiff to reply according to s. 6., and he replies as at common law, the jury need not inquire the value of the lands descended. *Mathews v. Lee* (g). In *Jeffry v. Barrow* (h), *Powis* and *Eyre*, J.s thought the jury who tried the issue of *riens per descent* were the only jury who by the act could inquire the value, though *Powell* J. differed. In actions on bonds for performing covenants in another indenture, stat. 8 & 9 W. 3. c. 11. s. 8. is held imperative on plaintiffs to assign breaches, in order to assessing damages thereon, *Roles v. Rosewell* (i); but

(a) See the cases cited 2 Saund. 7. c. note

(b) 2 Ro. Abr. 71. 11 Car. 1. B. R.

(c) 2 Saund. 7. a. b. c. notes 14 Vin. tit. Heir (D.) 2 Ro. Ab. 71.

(d) Cro. Car. 436. in Error; said, 14 Vin. Ab. 242. to be S. C. as *Frank v. Stukeley*.

(e) 7. c.

(f) *Qu.* If these cases apply to actions of debt on bond against the heir for sums certain, when the issue raised on the pleadings is under stat. 3 W. & M. c. 14. s. 6. ? See, however, 11 G. 4. and 1 W. 4. c. 48. s. 6, 7. as to covenants of ancestor.

(g) Barnes, 330. 2 Saund. 8. a. note

(h) 10 Mod. 18. Gilb. R. 232. S. C. Tidd, 9th edit. 574.

(i) 5 T. R. 538.

where the jury have neglected to do so, the remedy is only by *venire de novo*, *Edwards v. Brown* (a), which is not prayed for by this rule. If any one of the pleas is false, the heir at law is left, as before the statute, chargeable with the whole debt on a general judgment.

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Russell Serjt., and *Richards*, in support of the rule. — The plaintiff has here replied according to the statute; and the question is, whether, when the statute is proceeded on to that extent, it is not imperative as to the duty imposed by it on the jury? *Jeffry v. Barrow* (b) is also reported in C. B. *Gilbert's Reports* (c). There the jury did not find any value of the lands, and *Eyre J.* says the act was intended to prevent the heir from being charged for the whole by his false plea of *riens per descent*. This is not an inquest of office, but it is part of the duty of the jury on this issue to inquire of the value, and an attaint would lie for not doing it (d). — [*Bayley B.* In replevin, if the jury do not inquire the value of the rent arrear, pursuant to 17 Car. 2. c. 7, the defect cannot be supplied by a writ of inquiry (e). —] It is said that the defendants have lost the benefit of the statute by pleading any one false plea, so that the jury need not inquire under sect. 6. If *non est factum*, though found against the defendants, is not a false plea within their knowledge at the time of pleading, *Frank v. Stukely*, *Clothworthy v. Clothworthy* (sect. 6. applies). The pleas of fraud are *ejusdem generis*. If sect. 6. does not apply, where the heir has not aliened before action brought, and the heir who has or has had lands by descent pleads *riens per descent* at the time of action brought, the object of the statute is defeated, but the enacting words in sect. 6. are ge-

(a) Ante, 193. n.

(b) 10 Mod. 19.

(c) 279.

(d) Co. Lit. 355. b.

(e) See *Shoape v. Culpeper*, 1 Lev. 253. and cases collected in Tidd 9 edit. 575.

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neral, and not to be restrained by a preamble to sect. 5. This judgment will be bad on error or arrest of judgment.

LORD LYNTHURST, C. B. — The replication is, in substance, that pointed out by the statute, and the issue is joined on that replication ; the jury therefore might have inquired the value of the lands descended ; for the plaintiff, having pursued the directions of the statute, must take the consequences, one of which is, that the jury who tried the cause ought to inquire the value of the lands descended. The verdict being imperfect, then, a *venire de novo* must issue, unless the parties consent to an assessment of the value by a sheriff's jury or by an arbitrator.

As to the issues joined on the pleas of *riens per descent*, there is nothing in the replications to shew that those pleas were false within the knowledge of the defendants at the time of pleading them. They state that neither at the time of the action brought, or before, or since, have the defendants had lands by descent from their ancestor. The replications take issue on the former part only of these pleas, that after the death, and before the commencement of the suit, the defendants had lands by descent, viz., *before or at the time of action brought*, thus abandoning the surplus, and concluding with an averment of verification according to the statute. Had the whole issue tendered by the pleas been accepted, the question would have arisen, whether at the time they were pleaded they were false or true within the knowledge of the parties, and whether the statute 3 W. & M. applied to such a case. But a different issue is here, in fact, taken, on which the truth or falsehood cannot be ascertained ; if, after action brought, and before plea filed, the heirs had aliened, the plea could not be said to be false consistently with this replication.

BAYLEY B. — If the plaintiff shews that lands descended at any time after the ancestor's death, and before the commencement of the action, he is entitled to a verdict on the plea of *riens per descent*, but the knowledge by the heir of the fact of descent cannot then be in issue. He may plead that plea in ignorance of a small portion of land which may turn out to be his, *e. g.* acquired by the ancestor after mortgage of the rest. The pleas state more than was necessary, but as the replications are not co-extensive, they do not raise the issue, Whether the heirs had lands *after* the commencement of the suit, so that the Court cannot know whether they were aliened or not after that event. The issues which might have been raised on these pleas at common law are relinquished by the plaintiff, who replies under the statute; we are therefore not called on to say what the effect of replying as at common law to a plea of *riens per descent* is. And whether sect. 6. of 3 and 4 W. & M. c. 14. is general in its operation, or confined to cases of alienation before action brought, is not necessary to be decided. If it is not general, any provision for pleading *riens per descent*, where no alienation takes place before suit, is left out of that act, as well as 11 Geo. 4. and 1 W. 4. c. 47. Then does 3 W. & M. c. 14. s. 6. continue to a plaintiff his common law right to a general judgment, in case of a plea of *riens per descent* found to be false within the knowledge of the heir at the time of pleading, or does it confine that right to the cases mentioned in the latter part? (a) Now, that section does not provide the form of any judgment general or special in any cases besides those mentioned in the latter part, in which it provides a special judgment.

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(a) *Viz.* where the heir confesses the action without confessing assets descended, or has judgment against him by default on demurrer, &c. which entitled plaintiff to a general judgment at common law. *Davy v. Pepys*, Plowd. 440.

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That may raise an inference that the earlier part is general, applying to all pleas of *riens per descent*, whether alienation takes place after or before action brought. At common law, the heir's alienation barred the obligee of the ancestor; now, by 3 W. & M. c. 14. s. 5., the heir is charged according to the value of the lands aliened. As the award of a writ of inquiry according to the terms of the rule, might be reversed in error, a *venire de novo* is the proper course (a), if no arrangement takes place between the parties.

VAUGHAN and BOLLAND Bs. concurred.

Venire de novo to issue, unless the parties agree within a fortnight to the assessment of the value by a sheriff's jury, or reference to an arbitrator.

(a) As to costs of *venire de novo*, see ante, *Edwards v. Brown*.

May 25.

DOE dem. LEWIS against THOMAS PREECE.

A declaration in ejectment was served on two tenants in possession of different parts of the premises sought to be recovered. A third party entered into a rule to defend alone, as landlord. *Semble*, neither tenant in possession can be admitted to prove adverse possession by the other of the part held by him, for the judgment in ejectment would be evidence against both in an action for mesne profits.

EJECTMENT by a mortgagee. — *Catherine Preece* and *Thomas Mutlow*, tenants in possession, were served with copies of the declaration, and appeared; after which, the defendant *Thomas Preece* was admitted to defend only as landlord. At the last *Lent* assizes for *Herefordshire*, the defendant proposed to call *Mutlow* to prove adverse possession for more than twenty years by *Catherine Preece*. She had been in possession of all the premises for nearly forty years, except of a part let by the defendant to *Mutlow* at *Christmas*, 1826, and held

by him from that time to the time of bringing the ejectment. *Catherine Preece* was also tendered as a witness to prove adverse possession by *Mutlow* of that part. For the lessor of the plaintiff it was objected, that as *Catherine Preece* was in possession of part of the premises proceeded for, she could not be called to sustain the defendant's case, even as to the part not held by her, as she would be liable to the costs of an action for mesne profits, even of that part, for nearly two years previous to *Christmas*, 1826; and the title set up by the defendant to both parts being the same, she would be giving evidence to uphold her own possession; *Doe d. Foster v. Williams* (a). The witnesses were rejected, and the lessor of the plaintiff had a verdict.

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Godson moved for a new trial in *Easter Term*. — Though the declaration was served on both the witnesses as tenants in possession, *Thomas Preece*, having been admitted to defend as landlord, is the only defendant on the record, and neither of the tenants in possession would be liable for the mesne profits of the part held by the other. A rule being granted,

Russel, Serjt., and *Talfourd* now showed cause. — *Catherine Preece* was proposed to be examined in support of her own possession, which she would lose in the event of a verdict for the lessor of the plaintiff. *Doe d. Foster v. Williams*.

Godson admitting that when he called *Mutlow* he did not state to the learned judge that he proposed to confine that witness's evidence to the part held by *Catherine Preece*, —

(a) Cowp. 621.

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The Rule was discharged — BAYLEY B. saying that no injustice was sustained by the defendant. For as the witnesses rejected were identified with him in interest, by being tenants in possession at the time the ejectment was brought and served, the judgment therein would be evidence of the title of the lessor of the plaintiff in an action against the tenants in possession for the mesne profits, so as to bring them within the general rule alluded to (a).

Rule discharged.

(a) Bul. N. P. 87.

The proposed witnesses had a certain disadvantage attending the event of the suit one way: as a judgment for the lessor of the plaintiff would have the effect of turning them out of possession immediately; see Gilb. Law Ev. 106. as cited by *Tindal, C. J. Doe d. Teynham v. Tyler*, 6 Bing. 394.; and judgment by the consent rule had been signed against the casual ejector, on admitting the defendant to defend as landlord without the tenant, with stay of execution till the event of the trial in ejectment; so that on judgment for the lessor of the plaintiff, the tenants in possession were liable to an action for mesne profits. *Aslin v. Parkin*, 2 Burr. 665. On the same ground, had the tenants defended the possession, the landlord could not be called to support their title. *Ibid*.

It seems that when a lessor of a plaintiff claims lands in possession of different persons, and one of the tenants would be a material witness for the others, such tenant, before opposing or pleading, should suffer judgment to go by default as to the part in his possession, see Bul. N. P. 99.; or at least consent to a verdict for so much as he is proved to be in possession of. *Dormer v. Fortescue*, Willes, 343. n. For *Bourne v. Turner*, Stra. 632. decides that a landlord cannot be made defendant in ejectment in lieu of the tenant in possession, the latter being sworn to be a material witness for the former; for the declaration is delivered to the tenant in possession, who is liable for the mesne profits, *ibid*.; and the person actually in possession and trespassing must be defendant in that action. *Burne v. Richardson*, 4 Taunt. 720.

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HAWKES and Another, Assignees of STEPHEN DUNN,
against SAMUEL DUNN.

TROVER for two bales of bacon. Plea general issue.

At the trial before *Taunton, J.* at the Lent assizes for *Somersetshire*, the following facts were proved. The commission of bankrupt was dated 18th *May* 1830, and the assignment to the plaintiffs the 18th *June* in that year. The bankrupt, after residing at several places in *Exeter*, had gone to live at a shop in *Fore-street* in *June* 1829, where his son *Edwin*, aged 18, with his sister *Anna*, aged 22, had previously carried on a trade in bacon for some months, "*E. Dunn and Co.*" being on the door. On 1st *June* 1830, *Shepherd*, a provision dealer at *Plymouth*, who had had other dealings with *Edwin Dunn*, sent him two bales of bacon, directed "*E. Dunn and Co. Exeter.*" It arrived at the waggon-office in *Exeter*. *Edwin Dunn* met it there, and on 4th *June* sent it thence by waggon, without delivery in *Fore-street*, to the defendant, his uncle, at *Wiveliscombe*, *viâ Taunton*. It was delivered to him there on the 7th, the bankrupt being then in prison. The messenger under the commission arrived at *Wiveliscombe* on the 8th, shewed his warrant to the defendant, and told him he was come for bacon that had belonged to the bankrupt. Defendant said he had no bacon that belonged to *Stephen Dunn*, but he had some that came from *Edwin* and *A. Dunn's* shop in *Exeter*. The messenger told him to take care of it, and

A messenger under a commission of bankrupt shewed his warrant to defendant, and said, "I am come for bacon which belonged to *S. D.*" (the bankrupt.) Defendant said, "I have no such bacon: I have some that came from *E. and A. D.'s* shop in *Exeter.*" (a son and daughter of the bankrupt) The messenger desired him to take care of it, and not to part with it, as more would be heard about it. The defendant gave no answer. A day or two afterwards he suffered it to be removed

by *E. D.* and sent back to the tradesman who furnished it. Held that this was evidence of a conversion.

When goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them in transitu, and give them a new direction adverse to his principal; but if he give them a fresh destination, in furtherance of the usual course of business of the principal, they pass to the assignees, as in the order and disposition of the bankrupt.

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not to part with it, as more would be heard about it. There was no evidence of any answer by defendant. The messenger went again on the 29th, and asked for it, but the defendant said, he had sent it back to the place from whence it came. *Edwin Dunn*, for the defendant, proved that the whole business in *Fore-street* was his. That all of the bacon at that shop was obtained on his and his sister's credit, and that the bacon in question stood on the same footing; that his father lodged with him, paying a weekly sum, and served in the shop in his or his sister's absence: also, that defendant refused to keep the bacon, as there was a dispute about it, and helped to load it, in order to be sent back to *Shepherd* at *Plymouth*. On the 23d June, *Shepherd* regained it at *Exeter*. It was also proved that *Edwin Dunn* had obtained orders for the above bacon from several inhabitants of *Wiveliscombe* before the 4th of June.

The learned judge left it to the jury to say whether the stock of bacon in *Fore-street* was the property of *Stephen Dunn*, or of *Edwin* and *Anna Dunn*, stating that the business might have been carried on there by the latter colourably, while their father *Stephen* was the actual trader, and also that what took place at *Wiveliscombe*, was evidence of conversion by the defendant.

The jury found the business and stock in *Fore-street*, to be actually the property of the bankrupt, *Stephen Dunn*, and that whatever was done there, was done by him by the agency of his children, and gave a verdict for the plaintiff, damages 8*l*.

Wilde, Serjt. in *Easter Term*, moved for a new trial for misdirection, on the ground that there was no evidence of conversion. He contended that the defendant could not be made a bailee without his own consent, by being charged with the possession of goods of the title to which he was not cognizant. The distinction between

Alexander and Southey (a) and the present case, is that the warehousekeeper, there became a voluntary bailee. "Bring any one to prove it yours, and I'll give it you, and not else," has been held a qualified refusal, and no evidence of conversion; *Green v. Dunn* (b).—[*Lord Lyndhurst*, C. B. Here on the contrary the defendant disposes of the goods, and so makes his election between the claimants.—*Bayley*, B. When he delivered the bacon to the carrier, he gave no notice to the assignees. He might have said, as in *Wilson v. Anderton* (c), "I received it from my nephew, and unless you get an order from him, I can't part with it," but here he shifted the possession voluntarily. In the cases where the just inference from the refusal was, that the party is unwillingly in possession, and a conversion was accordingly negatived, he retained possession.—] *Wilde* mentioned another point, that the bacon being bought on the son's credit, and never having been at the *Fore-street* shop, it followed that, even if the business was the father's, his assignees could not take this bacon without indemnifying the son, who was personally liable for the value.

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Rule granted.

Crowder and *Follett* shewed cause.—The last point was not taken at the trial. The plaintiffs seek to recover for the bacon, not as being in the order and disposition of the bankrupt, but as his property, found in the hands of a third person. Though at the waggon office in *Exeter*, the bacon was in the order and disposition of the bankrupt, who, by the agency of his son *Edwin*, sent it from thence to *Wiveliscombe*. As to the conversion, if the defendant would have prevented being bailee against his will, he should not have given the bacon up to the bailor, but to the messenger. The plaintiffs do not rely

(a) 5 B. & A. 247. (b) 3 Campb. 215. n. (c) 1 B. & Adol. 450.

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on the defendant's qualified refusal, but on his actual act of ownership, in disposing of it elsewhere after the claim of the plaintiffs was known. The defendant took on him to decide on the property which he might think was in the children, though it was in fact in the bankrupt. *Alexander v. Southey* is inapplicable, for there the servant had no possession.—[Lord *Lyndhurst*. Here we take it on the verdict, that the possession of the son was that of the father.]—The bacon ought to have been given up, or a reasonable qualification annexed to the refusal. A bailee who makes himself a party, by acting for bailor, must stand or fall by the title of the latter (*a*). The question of conversion was left to the jury, on the evidence. Though the denial of goods to the person having a right to demand them is said by *Holt*, C. J. to be an actual conversion, *Baldwin v. Cole* (*b*), it is, at all events, evidence of a conversion.

Erskine and *Bere*, in support of the rule. — It was not left to the jury to say whether this bacon was, or was not the bankrupt's property. Now, it does not follow that *this* bacon was the bankrupt's, though that at the shop might be. It should have been left to them, whether this bacon was sent to *Edwin Dunn* for his own use and disposal. It cannot be said to be the bankrupt's property. The father was in prison when the bacon arrived, and the son sold it in the usual course of shop business. — [Bayley, B. *Edwin Dunn* swore there was no distinction between this bacon and the goods which had been furnished him from the commencing business in that shop.] — The defendant might retain the bacon

(*a*) See *per Lord Tenterden*, 1 B. & Adol. 456. Com. Dig. Chancery, (3 T.)

(*b*) 6 Mod. 212. in which, as well as in *M'Combie v. Davis*, 6 East. 538. and in *Hoare v. Parker*, 2 T. R. 376. there was a demand and a distinct refusal. See 2 Saund. 47. g. and 1 B. & Adol. 456.

for *Edwin Dunn*, on whose credit it was obtained, and who might have sued defendant for parting with them. *Edwin Dunn* had a lien, and never so parted with the possession as to divest himself of it. Thus, when a factor sells under a *del credere* commission, whereby he becomes liable for the price, he has a lien on the price, though he has parted with the goods (a). The bacon was originally destined for the customers at *Wiveliscombe*, and was at the defendant's house merely *in transitu*, not delivered to the purchasers. Nor was the defendant bound to keep it for the assignees, unless he had been a bailee for value. In *Devereux v. Barclay* (b), a warehouseman who had misdelivered goods by mistake was held liable in trover, *Abbott*, C. J. saying, it was a delivery contrary to the knowledge which, in point of law, the defendants ought to have had, and not an innocent delivery. In that light the delivery by defendant to *Edwin Dunn* cannot amount to a conversion, nor, if it were the bankrupt's property, had the defendant undertaken to keep it for the messenger.

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LORD LYNTHURST C. B. — I am of opinion that the rule for a new trial must be discharged. We are bound to assume, from this verdict, that the business in *Fore-street* was carried on by the children for the father, and that the goods were ordered for *Stephen Dunn*, the father, with a view to the directing them ultimately to *Wiveliscombe*. If *Edwin Dunn*, having bought them on his own credit, had, at the waggon office, and before they came to the possession of the father, given them a new direction, in order to protect himself, he might have been justified in so doing, but this bacon was in fact merely sent on from *Exeter*

(a) Selwyn's N. Pri. tit. Factor, 804. citing *Drinkwater v. Goodwin*, Comp. 251. *Hudson v. Granger*, 5 B. & A. 27. *Foxcraft v. Deronshire*, 2 Burr. 931.

(b) 2 B. & A. 702.

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to *Wiveliscombe*, in furtherance of the original intention with which it was purchased. It reached the destination which was designed it in the first instance, and must be considered as having been delivered to the defendant there by the father, *Edwin's* opportunity for controul over it being at an end.

As to the second point, that there was no evidence of conversion: the property being transferred to the assignees by the bankruptcy, the messenger goes over to *Wiveliscombe*, to ascertain whether the bales are in the defendant's possession. He does not demand them, having probably no means of carrying them away. He shews him his warrant, and desires him not to part with them. Had the defendant made any answer calculated to awake suspicion, the messenger might have seized them, but none being made, his acquiescence is presumed. Yet afterwards, on the direction of *Edwin Dunn*, the defendant took on him to deal with the goods, and send them back to the parties of whom they were purchased. That is strong evidence of conversion.

BAYLEY B.—The property in the bacon was duly vested in the assignees, in right of the bankrupt. The business in *Fore-street* was substantially his, and is so found by the jury, who disbelieved the statement of *Edwin Dunn*, that it was his. He, however, made no distinction between the bacon in question, and the other goods in the shop, but treated them as placed on the same footing. Then why should the learned judge leave it to the jury, that this particular bacon was to be placed on any other? The goods were originally sold on the son's credit, as had been the usual course of business. The seller sent them to *Exeter*. When they got there they received a new destination. Now, if *Edwin*, the son, had there given it a new direction adverse to his father's, and contrary to the course of dealing for which

he, as agent to his father, had ordered it; and with that view had separated it from the rest of his father's goods, in order to protect himself, that might have prevented the property vesting in the father, so as to pass to his assignees. Here, on the contrary, he gives them a new destination, not adverse to his father, but in furtherance of, and as part and parcel of the business of the shop. By his thus continuing to act for the benefit, and as agent of his father, the new destination was substantially given by the father. I am also of opinion that there was sufficient evidence of a conversion. The defendant lulled the messenger into security, by giving him no answer. Had he said "I cannot retain them; I must deliver them to *Edwin* and *Anna*, if I am called on to do so," the messenger would have been put upon seizing the bacon. Then had the defendant a right to send it back to the place from which it came, consistently with his silence and implied consent to suffer it to remain, when desired not to part with it? There is no doubt that the property was in the assignees, who were also entitled to possession; and it may make a difference to them, whether it remained in the defendant's hands or in those of the party from whom he received it, which person may be insolvent.

VAUGHAN B. — The struggle at the trial was, whether the business in *Fore-street* was that of the father or the son, and the jury thought it was carried on for the father's benefit. Unless there was a perverse verdict, or a misdirection in point of law, the Court could not interfere on account of the small amount of the verdict. The bacon was perhaps bought on the credit of the son. Then how is it dealt with? When the son, at the waggon-office, deals with it as is here proved, does he not cease to be the purchaser, and become the agent of the father? His directing the goods to go to *Wiveliscombe* in conse-

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quence of previous orders, is consistent with his acting for his father in the *Fore-street* business. The jury, then, were not wrong in that part of their verdict. There is evidence of a refusal as well as a demand, and a conversion might well be inferred.

BOLLAND B. — My only difficulty is as to the conversion. I do not think the evidence given amounts to proof of demand and refusal. These goods are not shewn to be coming to defendant within his knowledge, and had he said he had nothing to do with them, that he did not know they were coming to him, that might have exonerated him. But his answer is, not that of an innocent bailee, but rather of a man holding himself not liable to the demand made of *Stephen Dunn's* goods. The messenger might not have omitted the opportunity of seizure, had not the defendant allowed him to become secure, that he would act as warehousekeeper.

Rule discharged.

May 28.

BEVAN *against* KNIGHT.

A trial is not lost, unless judgment of the term is lost by the defendant's delay to put in and perfect bail in due time. Proceedings on a bail bond were stayed after bail put in and justified, on the usual terms, without the bail bond standing as a security, where the writ being returnable the last day of one term, the trial might have been at the first sittings in the next, had bail been put in in due time.

ON the 24th *Tyrwhitt* obtained a rule for staying proceedings on the bail bond, bail having been put in and justified on that day, (a) and for staying proceedings in the mean time on payment of costs. The defendant resided in *London*. The writ was returnable on 9th *May*, the last day of *Easter* term, and the declaration was then filed conditionally. Bail above not

were stayed after bail put in and justified, on the usual terms, without the bail bond standing as a security, where the writ being returnable the last day of one term, the trial might have been at the first sittings in the next, had bail been put in in due time.

(a) 2 Wils. G. 2 Chitty's R. 108.

having been put in in due time, the bail bond was assigned on the 18th, and on the 19th a *quo minus* was served on the bail, returnable on the 20th. The 23d was the first day of *Trinity* term, and the bail justified in the original action on the 24th. The first sittings in *Trinity* term were fixed for 2nd *June*. The application being on the part of the defendant in the original action, an affidavit of merits was made. (a)

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Whitmore shewed cause. — The plaintiff is entitled to call on the bail to consent that the bail bond shall stand as a security for the debt, for bail should have been perfected five days before, though a judgment of the term might still be obtained. The plaintiff has lost a trial at the first sittings in it. He cited 1 *Archbold's K. B. Practice*, 2d Edit. 99, which states "a plaintiff is said to have lost a trial when the time has elapsed at which the writ of *distringas juratores* might have been made returnable, supposing the plaintiff to have proceeded in the action without delay."

Tyrohatt in support of the rule. — The writ being returnable on the last day of *Easter* term, no trial could have been lost. *Adams v. Thompson*. (b) — [*Bayley B.* There was no declaration *de bene esse* in that case. —] At all events, a trial can only be lost, where by the neglect of the defendant to put in or perfect bail in due time, the plaintiff has been prevented from trying his cause in the same term in which his writ was returnable, and also from obtaining judgment in that term. (c)

Per Curiam. — A trial can only be lost where judgment of the term is lost, by the defendant's delay to put in and perfect bail. As that does not appear to be the

(a) See Tidd, 9th ed. 802.

(b) 1 Chit. R. 357, n.

(c) Tidd's Practice, 9th ed. 303.

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case here, (a) the bail-bond cannot be required to stand as a security. The rule must be absolute on the terms of pleading issuably, and taking short notice of trial for the last sittings in term.

(a) For the action not being by original, the plaintiff could have judgment of the term after trial, at the last sitting. Tidd, 9th ed. 304. See *Searle v. Hale*, 3 Pri. 53.

CROSBY *against* DAVIS.

On the 26th of *April*, *Kelly* obtained a rule to stay proceedings against the sheriff. The irregularity was, that the bail-piece was filed with the Baron's clerk at chambers, but was not carried from thence and filed with the master in the Exchequer office, as in K. B. The party proceeded against the sheriff for that neglect; the bail had been perfected before the error was committed. The bail-piece was now filed afresh, and a fresh notice of bail given, to which no exception was entered.

On the 2d of *May*, *Wightman* shewed cause.—The mistake in filing the bail-piece occasioned proceedings against the sheriff. It does not appear whether the application was by the defendant, the bail, or the sheriff; if by the defendant, there should be an affidavit of merits, which is a preliminary objection.

LORD LYNDHURST, C. B.—If the application is by the sheriff, or on his behalf, there should be an affidavit that he has no collusion with the bail or the defendant; if by the bail, they must swear that they have no collusion with the defendant.

BAYLEY, B.—If this application is made by the defendant, an affidavit of merits is required in K. B. under the rule M. 59 G. 3. (b) On the Court inquiring into the practice of this Court, a sworn clerk in court stated, that when a trial had not been lost, the practice of this Court varied in these particulars from that of the K. B. (c)

The rule was made absolute on payment of costs, and on the terms that *Kelly* should produce a supplementary (d) affidavit of merits, and if a trial had been lost at the third sittings in term, should undertake to try at the first sittings after term, giving judgment of the term.

On the 5th of *May*, *Kelly's* rule of the 26th of *April* was discharged for want of complying with the terms of producing an affidavit of merits, and the attachment issued against the sheriff.

(b) Tidd, 9th ed. 302.

(c) See Tidd, 9th ed. 302. citing 11 Price, 633. 636. 13 Price, 114. M'Clell, 44. S. C.

(d) Permitted in C. P. not in K. B. Tidd, 9th ed. 1216. 1218.

On the 7th of *May*, *Kelly* obtained a rule to discharge the rule of the 5th of *May*, which confirmed the proceedings against the sheriff for not bringing in the body, by discharging the rule of the 26th of *April*; and produced an affidavit of merits.

On the 9th of *May*, *Wightman* shewed cause.—The affidavit of merits is not sufficient, being that defendant has, “in counsel’s opinion, a good defence upon the merits.”

Rule Discharged.

A similar rule was afterwards obtained by *Kelly* on a sufficient affidavit of merits. A declaration had been filed, and rule to plead given, but no demand of plea so as to waive bail. The rule was made absolute on 8th *June*, on payment of costs and terms of taking notice of trial for the sittings after the term, giving judgment of the term, the attachment against the sheriff standing as a security if the verdict should be for plaintiff to the satisfaction of the judge; but if not, the attachment to be suspended by his discretion till next term. See *ante*, 261.

SMITH v. PARSLOW.

May 5.

Heaton moved to discharge a rule for an attachment against the sheriff, for not bringing in the body, and to allow bail to justify. Bail had been allowed on the 19th of *April*, but the bail-piece not having been filed with the master in the Exchequer office, the rule for an attachment was obtained, and served on the 4th of *May*. The bail had not justified again previously to this motion. On affidavit that the necessity of filing the bail-piece was unknown to the defendant’s attorney,

Practice of discharging an attachment against a sheriff for not bringing in the body.

A Rule was granted for staying proceedings on the attachment till the 9th, the day for shewing cause, on putting in bail afresh, and giving two days’ notice of their justification, the bail to be perfected, and bail-piece filed on the 9th. On that day, the above requisites having been complied with, the Rule was made

Absolute, on payment of costs.

In *Williams v. Waterfield*, 1 Bos. & P. 334. the C. P. held that bail so justifying might be opposed by plaintiff without prejudice to his subsequent right to oppose the rule for setting aside the attachment against the sheriff. The practice of the King’s Bench is stated to be, to dispose of the latter rule before justifying the bail, *per Buller*, J. S. C.; but in the Exchequer, bail must, in term time, be justified at the sitting of the Court, before the other ordinary business, except on the first and last days of term. See the Rules of Court, *post*.

As to the affidavits in support of this rule, see *Tidd*, 9th ed. 316.

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June 8.

FAREBROTHER and Another *against* WORSLEY and Others, Executors of HIRST, deceased.

A sheriff's bailiff covenanted with a sheriff to give him correct instructions for his returns, and to pay him all the costs of defending actions, or making or opposing motions, touching any matter in which the bailiff should act as such; and also to indemnify him against all expenses he might pay or be liable to, *by reason of the executing, not executing, returning, not returning or misreturn of any process, &c. occasioned by the act or default of the bailiff.* The bailiff gave correct instructions for a return of *nulla bona*, which was accordingly made. An action being brought against the sheriff for that return, he sustained expence in defending it. Held, that the bailiff was liable to indemnify the sheriff for the amount.

COVENANT on a bond executed to the sheriff of *Middlesex*, by a bound bailiff and his sureties.

Declaration stated, That by indenture of 28th September 1826, the plaintiffs, described therein as and then being sheriff of the county of *Middlesex*, of the one part, and *Joshua Hirst*, the younger, the defendant, *Worsley, J. N., D. R., R. I., W. C.,* and *I. Hirst*, the elder, since deceased, of the other part, (profert of the indenture) the plaintiffs, at the instance and request of the said *J. H.*, the younger, and in consideration of the covenant and agreement therein after entered into by them "did nominate and appoint the said *J. H.*, the younger, to be one of the bailiffs of the said sheriff (during the pleasure of the said sheriff), permitting him to receive to his own use, all lawful fees usually received by sheriffs' bailiffs, in the said county of *M.*, but reserving to the said sheriff the poundage, and such other fees and profits on writs of execution and extent, as had been usually received by the sheriff of the said county of *M.*, and all such other fees and emoluments to the said sheriff belonging; and in consideration of the premises, the said *J. H.*, the younger, the said other sureties, and the said *J. H.*, since deceased, for themselves, jointly and severally, and for their several and respective heirs, executors, &c. did and each of them did covenant &c., to and with the said plaintiffs and each of them; 1st, (a) *That* the said bailiff should duly execute all warrants or mandates

(a) These numbers, 1st, &c. are here inserted for convenience of reference to the different clauses of the covenant. They did not exist on the pleadings.

to him directed by the said sheriff, under-sheriff, or deputies, or any of them in the name of the said sheriff.

2dly, *That the said bailiff should give regular instructions in writing for the returns of all writs or process in all cases in which warrants should have been executed by or directed to the said bailiff.* 3dly, *That the said bailiff should and would forthwith pay to the said sheriff, under-sheriff, or deputies, all monies received by the said bailiff, on any arrest or levy by him made or with which he should be intrusted for the said sheriff without deduction.* 4thly, *That the said bailiff should in all things truly, lawfully, and honestly demean and behave himself as bailiff aforesaid, and in due and lawful manner, all and every of the lawful commands or directions of the said sheriff, his under-sheriff, and their deputies, touching any manner of service incident or belonging to the said office of sheriff, should and would execute and perform.* 5thly, *That the said bailiff should and would well and truly pay to the said sheriff, his under-sheriff, or deputies, or one of them, the costs and charges of defending any action and of prosecuting or opposing any motion in or application to the Court, touching or concerning any matter wherein the said bailiff should act or assume to act as bailiff to the said sheriff.* 6thly, *That the said bailiff and his said sureties, some or one of them, should indemnify the said sheriff and his under-sheriff from all damages, loss, costs, and charges, which they or either of them should or might suffer, sustain, or be put unto or be liable to suffer, sustain, or be put unto for or by reason of the payment of any money by the said sheriff, under-sheriff, or deputies, to any person or persons, or by reason of any return to any writ or process made by the said sheriff, under-sheriff, or deputies, at the request of the said bailiff.*

And that the said bailiff and his said sureties, some or one of them, their or some or one of their heirs, execu-

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tors, or administrators, should and would save harmless and indemnify the said sheriff and under-sheriff from and against all actions, suits, fines, and amerciaments, penalties, contempts, forfeitures, loss, costs, charges, and expences, which might be commenced, prosecuted, imposed, or set upon them or either of them, or which they or any or either of them might suffer, pay, or be liable unto *for or by reason of the executing, not executing, returning, or not returning, or misreturn of any writ, process, mandate, precept, or warrant, occasioned by the act or default of the said bailiff*, or by reason of execution, escape, or any other cause whatsoever happening *by the act or default of the said bailiff*, (reference to the indenture) by virtue of which said indenture, the said *J. H.* the year afterwards, to wit on &c., at &c., became and was one of the bailiffs of the said *plaintiffs*, then and there being sheriff of the said county of *Middlesex*.—That after the making of the said indenture, and whilst the said *plaintiffs* were sheriff of the said county, and whilst *J. H.* the younger was one of the bailiffs of the said *plaintiffs* as such sheriff, to wit on 2d *May* 1827, a *fiery facias* was issued out of King's Bench, commanding the said sheriff to cause to be levied of the goods and chattels in his bailiwick of *A. H. Chambers*, a debt of 16,000*l.* and 7*l.* damages, recovered by *H. Wilton*, against him.—That the writ was afterwards duly endorsed to levy 1825*l.* 10*s.* 5*d.*, and on 21st *May* 1827, at &c., was delivered to the *plaintiffs* as such sheriff, to be duly executed, and that by virtue thereof they issued their warrant to said *J. H.*, the younger, then being one of the bailiffs of the said sheriff, thereby commanding him to levy the said debt and damages, so that the sheriff might have the money at the return to render to *Wilton*.—That the warrant was delivered to *J. H.*, the younger, to be executed.—And the said *plaintiffs* say, that the said *J. H.*, the younger, acting and assuming

to act as bailiff of the said plaintiffs, so being sheriff as aforesaid, and for the purpose of executing such last-mentioned warrant, afterwards, to wit, on &c., at &c., before the return of the said last-mentioned writ, and within the bailiwick of the said sheriff, did seize and take divers goods and chattels then in the possession of *F. Bernasconi, &c.* of the value of 20,000*l.*, but did not levy thereout the sum indorsed on the said last-mentioned writ or any part thereof. And the said plaintiffs say, That before the time of the said seizure last-mentioned, to wit, on the 19th *November* 1825, at &c. a certain commission of bankrupt had been awarded and issued against the said *A. H. Chambers*; and the said *F. Bernasconi, &c.*, at the time of the said seizure last-mentioned, held and claimed possession of the goods and chattels so seized as assignees of the estate and effects of the said *A. H. Chambers*, in the said writ named under the said commission, to wit, at &c. And the said plaintiffs say, that afterwards, to wit, on the 23d *May*, 1827, at &c., a certain rule was made by the said Court of King's Bench, whereby the said plaintiffs, sheriff as aforesaid, were ordered by the said Court to return the said last-mentioned writ, and thereupon afterwards, in *Easter* term in the year last aforesaid, at &c., the said plaintiffs, sheriff as aforesaid, did move the Court that the said rule to return the said last-mentioned writ might be enlarged until the said sheriff should be indemnified to the satisfaction of the Master. And such proceedings were thereupon had in the same Court in respect of the said motion, touching the said last-mentioned writ and the return thereof, that the said plaintiffs were thereby then put unto divers other large costs and charges about the same motion, to the amount of a certain other large sum of money, to wit, the sum of 20*l.*, to wit, at &c. Averment of notice to *J. H.*, the younger, and request to him by the plaintiffs, to pay them the said costs and

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charges to which they had been so put as last aforesaid. And the said plaintiffs say, that by reason of the said last-mentioned seizure and of the acts of the said *J. H.*, the younger, done in and about the executing of the said last-mentioned warrant, the said *F. Bernasconi*, &c. afterwards, to wit, in *Trinity* term, in the year last aforesaid, at &c., commenced and prosecuted in the said Court of King's Bench, the said Court then and still being holden at *Westminster* aforesaid, a certain action of trespass against the said now plaintiffs, and the said *H. Wilton*, in consequence whereof the said plaintiffs did afterwards, to wit, in the term and year last-mentioned, make an application in and to the said Court to stay the proceeding in the said action of trespass last-mentioned, until they the said sheriff should be indemnified, and such proceedings were thereupon had in the same Court touching the said application, that the said plaintiffs were thereby there put into divers other large costs and charges about the same application to the amount of 10*l.*, to wit, at &c. Similar averments of notice and request.

Six breaches preceded that in question, which was as follows: And the said plaintiffs say that the said *J. H.* the younger, as such bailiff as aforesaid, after the making of the seizure last above-mentioned, and before the return of the last-mentioned writ, to wit, on 28th *Nov.* in the year last aforesaid, at, &c., instructed the said plaintiffs as such sheriff, and requested them to return, and the said plaintiffs as such sheriff did, by his instructions and at his request, then and there return upon the said last-mentioned writ, that the said *A. H. Chambers* in the said writ named, had not any goods or chattels in the said sheriff's bailiwick, whereof the said sheriff could cause to be levied the debt and damages in that writ mentioned, or any part thereof, by reason whereof the said *H. Wilton*, afterwards, to wit, in *Hilary*

term 1828, commenced and prosecuted in the Court of Exchequer, to wit, at &c. a certain action on the case against the plaintiffs, for recovery of the damages alleged to have been sustained by the said *H. Wilton*, by reason of the said return so made by the said plaintiffs upon the said last-mentioned writ, and of the non-execution thereof; and such proceedings were thereupon had in the said court of his said late Majesty, in the said last-mentioned suit, that the said now plaintiffs, by reason thereof, did suffer, sustain, and were put unto divers other large damages, losses, costs, and charges, to the amount of 500*l.* in and about defending the said last-mentioned action, and incidental thereto, of all which several premises, the said *J. H.* the younger, afterwards, to wit, on &c. at &c. had notice, and was then and there requested by the said plaintiffs to pay them the damages, losses, costs, and charges which the said plaintiffs had so suffered, sustained, and been put into, as last aforesaid, and to indemnify them from and against the same, to wit, at &c.

The first plea to the seventh breach traversed the instructions by *J. H.* the younger, to the plaintiffs, as to the return to the writ against *Chambers*, concluding to the country. The second plea to it was, that the said *A. H. Chambers* had not, at any time from the delivery to the said *J. H.* of the said writ of *feri facias*, in that breach mentioned, before the said return thereof, any goods or chattels in the said bailiwick of the said sheriff, whereof the said sheriff could cause to be levied, the debt and damages in that writ mentioned, or any part thereof. Concluding to the country.

Demurrer to the second plea, and joinder in demurrer.

J. Burchell for the plaintiffs.—The claim which forms the subject matter of the breach rests on the terms of

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the return made on the bailiff's instructions. The words of the last clause of his covenants are, that the bailiff and his sureties shall indemnify the sheriff against all actions, loss, costs, charges, and expences, which he might suffer, pay, or be put unto, "*for, or by reason of, the executing, not executing, returning, or not returning, or misreturn of any writ, process, &c. occasioned by the act or default of the bailiff.*" These terms are not confined to indemnity for wrongful acts, or omissions of the bailiff, but their generality includes every return by which the sheriff incurs possible risk or loss. As the sheriff is equally exposed to be made defendant in an action, whether the bailiff's instructions for a return are true or false, he is entitled to indemnity for the consequences of either. The sheriff's bond interposes the bailiff as an ultimate indemnity to the sheriff for the risks of office, the sheriff always having the burden of responsibility to the parties in the first instance. The office of bailiff being a continuing one, and fees being payable to him on each writ he executes, a consideration applies in every case where the sheriff can claim indemnity. Under the other special covenants, the bailiff who assumes to act as such is to pay the costs incurred by the sheriff in defending actions by third persons against him, arising on the act of the bailiff. Thus, the instructions to return the writ *nulla bona*, are his *act*. If the truth of the return so founded is a good defence to this action on the bond, to recover costs incurred in an action against him for a false return, then, if he has a verdict but cannot procure payment of costs, he is remediless. Again, if a bailiff can shew that the verdict against the sheriff is improperly obtained, or if a rule against a sheriff, arising out of the bailiff's act, is discharged, the latter might be equally exempted from reimbursing the sheriff's costs. Had it been intended to confine the sheriff's indemnity by the bailiff, to cases of false re-

turns, the words would have been less general.—[*Bayley* B. Suppose costs are awarded against a sheriff in an action against him, which he rightfully defended, would the bailiff be liable to indemnify him against extra costs? If he would, that may shew the bailiff liable for the consequences of *any* act.]

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Manning for the defendants.—The sheriff's attempt to shift this risk on the bailiff, is contrary to the policy of the law, which gives poundage as a remuneration for that risk, and which poundage is here retained by the sheriff; and contrary to the parties' contract, because the words of the last clause "occasioned by the act or default of the bailiff," override the preceding general words of the fifth clause. Indemnity against "act or default," must be confined to wrongful acts only, and cannot apply to a correct return by the bailiff to the sheriff. Thus, a covenant for quiet enjoyment against the let of persons claiming under grantor, *or of any other person soever*, applies to *lawful* let only (a). The only remedy of a sheriff sued for the bailiff's wrongful act, is against the latter and his sureties, but where the bailiff proceeds right, and the act of a third person in bringing an action against the sheriff may be wrongful, the remedy is against that person, and not double against him and the bailiff. The breach is ill assigned in not shewing whether the action by *Wilton* against the plaintiffs as sheriff is pending or ended, and if ended, with what consequences, or what has been done if pending (b). If the

(a) See *Dudley v. Folliott*, 3 T. R. 584. *Ogden v. Folliott*, id. 726.

(b) On a subsequent day, a motion by *Manning* to plead *de novo* was supported by an affidavit, stating, *inter alia*, that a special verdict had been found in *Wilton v. Farebrother*, but not argued, and that the present plaintiffs, with consent of the defendant *Worsley*, compromised the suit with *Wilton*, consenting to a verdict for 200*l.* damages and 400*l.* costs, so as to put it out of their power, by getting costs from *Wilton*, to relieve the bailiff on the bond.

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action is for costs of a pending proceeding, it may be repeated as they accrue *de die in diem*, though the sheriff may ultimately receive costs from his opponent. Nor is it shewn that the costs were incurred necessarily, or as necessarily incidental to the defence of the action by *Wilton*, or with the consent of the defendants. The costs sought to be recovered may have been wantonly incurred by the sheriff in a contest with the assignees of *Chambers*.

LORD LYNDHURST C. B. — A return having been made by the sheriff in pursuance of his bailiff's instructions, which, for the purposes of the argument, are admitted to be correct, an action has been brought against the sheriff in consequence of that return, in which he has incurred costs. The question is, whether by this deed the bailiff is bound to indemnify him for those costs? and I am of opinion that he is so bound. For I think the present claim falls precisely within the language and purview of a particular covenant, and after looking at the rest of the instrument to ascertain any thing which might prevent us from giving that covenant its obvious construction, I find nothing to justify us in declining to put upon it that interpretation which its terms naturally import. The part of the covenants to which I refer is this (a): That the bailiff shall pay to the sheriff the costs and charges of defending any action, and of prosecuting or opposing any motion in, or application to, the Court touching or concerning any matter wherein the said bailiff should act or assume to act as bailiff of the said sheriff. In the action of *Wilton v. Chambers*, the bailiff pointed out to the sheriff the return which was afterwards made to the *fiery facias*: an action brought in consequence of that return was

(a) See 5th clause.

defended, and costs were incurred by the sheriff. Those, therefore, are costs and charges in defending an action "touching a matter," that is, touching a return, wherein the bailiff acted as bailiff to the sheriff; and I see no reason arising from the rest of the deed why those express terms should receive a qualified interpretation.

The subsequent covenants appear to me more doubtful in their construction. The sheriff is to be indemnified against any loss or damage which may arise to him by reason of any "act or default" of the bailiff. To consider the word *act* as identical with *default* would render the word *act* surplusage, without giving that distinct meaning to it which should be given to every word. But if the bailiff acts correctly, in giving the sheriff proper instructions for his return to process, and an action is nevertheless brought against the sheriff in consequence of that return, I do not think that the sheriff's loss and expence thereupon could fairly be considered as a loss and damage sustained by reason of the act of the bailiff, or of the return, which are both correct. A third person has thought proper to bring an action, probably without justifiable grounds, and the sheriff's damage seems more to arise from the act of that third person, than from that of the bailiff. The same reasoning applies to the other subsequent covenants, but there is no necessity to rest the judgment on them. The ground of my decision is, that the covenant to which I have referred embraces this case in terms, from the natural import of which there is no reason to detract. It was objected, that the breach should have assigned that the costs and charges were necessarily incurred in defending the suit; but the terms of the covenant are here followed in the pleading, so that it does not appear to me necessary so to have qualified the breach. Nor could more than the necessary amount of costs be recoverable under it. The Court was also asked what costs could be said to be "incidental

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to the sheriff's defence to the action," the breach claiming such costs. But those terms seem the same with costs of defending the action, and carry the case no further. Under these circumstances, I am of opinion that the judgment must be for the plaintiff.

BAYLEY B. — I concur entirely with the judgment of my Lord *Lyndhurst*, and found my opinion on the same covenant. The sheriff may select such persons as he may think fit to act for him in executing process, and may impose any terms which the bailiff and his sureties may think fit to acquiesce in. The instrument in question contains, among other things, a stipulation that the bailiff shall pay to the sheriff the costs of defending any action, concerning any matter wherein the bailiff shall act as such. As to the terms of the breach, I have no doubt that the plaintiffs have sufficiently alleged that they have incurred costs in defending an action touching a matter in which the bailiff acted as such, and the sheriff may thereupon call on him and his sureties to reimburse him those costs, unless the nature of the deed itself, or other circumstances, will justify the Court in putting a construction on the words referred to, differing from that which, *primâ facie*, belongs to them. But I perceive no sufficient reason for so doing, for there is nothing in the clauses which precede or follow these words, which shews that this covenant ought not to receive the same interpretation as if it stood *simpliciter* by itself. The early part stipulates, that the bailiff shall faithfully demean himself, and points out the duty he is so to execute. Next it details the instances in which the sheriff might be put to expense, among which is the stipulation which my opinion proceeds on, and afterwards follow more special clauses for the sheriff's indemnity.

The general scope of these latter may be considered to embrace cases on which the bailiff is, in some respects,


to blame, but that does not seem necessarily the case, and many of the concluding words imply that the sheriff might call on the bailiff to indemnify him, though there was no breach of duty by the bailiff himself. The sheriff may be called on to answer for, and be damnified in consequence of the acts of the bailiff, though the latter may have acted properly in every respect; and it may be collected from this deed, that it was the intention of the sheriff to secure himself indemnity, whether the bailiff was to blame or not. As both parties may be innocent, there is no reason why the sheriff should suffer, and why he should not stipulate with the bailiff that the hazard arising from the result of his act should fall on him; and I think that to be the fair construction of this stipulation. Had the plea raised any question, whether the expences had been incurred by the sheriff of his own wrong, and that he had, of his own wrong, defended the action, so as to shew blame in him in so doing, he would be the proper person to bear that expense. But we cannot say on this record that he has been, in any respect, to blame, or that he can be looked on in any other light than an innocent party put to expence of defending an action, which, but for the bailiff's act, never could have been brought.

I am, therefore, of opinion, that judgment must be for the plaintiff, and though I entertain no doubt on the question, I am glad that it is on the record, so as to be open for the decision of a court of error.

VAUGHAN B. — This is a demurrer to a plea professing to be an answer to the seventh breach assigned in the declaration, and the question is, whether or not this plea is an answer to that breach, supposing it well assigned. It is at least doubtful, whether the act of the bailiff stated in this breach, was, as argued, correct. The intention of the covenants, as collected from these

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terms, must rule. They are various and comprehensive, becoming more special as they proceed, and the intention of the whole is to provide for every expense the sheriff incurs in consequence of any act, rightful or the contrary, of the bailiff. There is no law or policy which prevents a bailiff from acceding to such stipulations as the price of his office, and these do, in terms, comprehend this case of costs incurred by the sheriff in defending *Wilton's* action. I concur that judgment must be for the plaintiff.

BOLLAND, B. — It is argued for the defendants, that this is an attempt on the part of the sheriff to fix the defendants, contrary to the policy of the law and the effect of the instrument. But a mere agreement between two parties who have particular duties to perform, for the sharing them, and the responsibilities of them, cannot be against the policy of the law, the one being free to impose, and the other to accept or reject the terms offered. Nor do I think this clause contrary to the terms of the deed in question, as the sheriff's intention appears to have been that the covenant to be entered into by the bailiff should be large enough to cover all expences incidental to the duties he would have to perform, whether they arose from his defaults, or from his right or wrong acts. The question then is this, whether the contract is framed in such terms as to comprehend that intention. The sheriff is to be indemnified for the expences to which he might be liable, *for*, or *by reason of*, the bailiff's executing or not executing, returning or not returning, or misreturn of, any writ, &c. Those being the causes from which the consequences "occasioned by the act or default of the bailiff" are to flow, I should give a larger interpretation to these terms than my Lord Chief Baron, for I conceive the words 'act or default' not to be tautologous, but words which are used in the attempt to

make more clear what would be as plain without them ; for the previous words relating to the execution of process completely embrace their meaning. When I look to the other parts of the contract, and inquire the meaning of the act of the bailiff, and whether or not it was meant to refer to his or others' acts, I think the earlier words bind the bailiff to take on him, if not all, many liabilities ; and I cannot refer the word ' returning,' in the latter part, to any thing but the mere act of the bailiff, as contrasted with his omissions or wrongful acts there also provided against. On that construction the sheriff is to be indemnified against the consequences of the mere act of the bailiff, whether right or improper.

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Judgment for plaintiff.

See per Abbott. C. J. *Devereux v. Barclay*, 3 Bar. & Ald. 704:

Manning moved that the demurrer might be withdrawn, with liberty to plead *de novo*.

Practice.
Time for
withdrawing
demurrer.

LORD LYNTHURST, C. B. — This application is not only postponed till after argument, but is not made till judgment has been pronounced. That is contrary to the practice. (a)

BAYLEY, B. — Even after argument the application to withdraw a demurrer, in order to amend, can only be made on affidavit shewing that the justice of the case requires a trial of the merits. (b)

(a) See Sayer's R. 116, 117. *Partridge v. Court*, 5 Pri. 424.

(b) See Tidd, 9th edit. 710. S. P. in a similar application by *Creswell* in *Gledstane v. Hewitt*, 10th June.

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June 8.

HOLLAND against PELHAM.

A grant of an annuity for four lives, with a covenant that the grantor shall insure the principal sum within thirty days after expiration of the third life, is not a contract for a loan within the usury laws, but a sale of an annuity in which the principal is in hazard.

Semble, in an action on an annuity deed for arrears, if it is intended to raise an issue for a jury, whether the deed was a contrivance to cover usury, it is not sufficient to plead the usurious agreement, but the plea must state that the deed was executed by way of contrivance, and in pursuance thereof.

IN 1805 *Stewart*, and *Pelham* as his surety, in consideration of 1000*l.* paid to *Stewart*, granted an annuity of 120*l.* to *Holland*, for the term of the joint natural lives of *Holland*, *M.* his wife, *M. A. H.*, and *L. D.*, and the lives and life of the survivors and survivor of the longest liver of them. They also, for themselves, their heirs, executors, and administrators, covenanted with *Holland*, his executors, administrators, and assigns, within thirty days next after the decease of such three of them, the said *Holland*, *M.* his wife, *M. A. H.* and *L. D.*, who should first depart this life, to insure, in some respectable office of insurance in *London*, for the use of the said *Holland*, his executors, administrators, and assigns, the sum of 1000*l.* to be paid on the decease of the survivor of them; the aforesaid nominees, and upon the completion of such insurance, to make such assignment of the policy or policies thereof, unto the said *Holland*, his executors, administrators, and assigns, as should be requisite to make over the same, and all benefit thereof, to him and for his and their sole use.

This was an action of covenant on the above clause in the annuity deed to recover arrears of the annuity. Plea, (after setting out the deed on oyer) That before the making of the said indenture, to wit, on 1st October 1805, it was corruptly and against the form of the statute in that case made and provided, agreed as therein mentioned, that the said plaintiff should lend and advance the said sum of money in the said indenture in that behalf mentioned, upon the terms, stipulations, and agreements, and in manner and form therein mentioned, and that the said defendant should execute and deliver

the said indenture for securing the repayment thereof, in manner aforesaid, and according to the terms and stipulations therein also mentioned ; and the said defendant further saith, that, in pursuance of such corrupt and unlawful agreement so made as aforesaid, the said plaintiff heretofore, to wit, on &c., lent and advanced the said sum of money in the said indenture in that behalf mentioned, upon the terms, stipulations, and agreements, and in manner and form, as in the said indenture mentioned ; and the said defendant made and sealed, and as his act and deed delivered the said indenture to the said plaintiff, and the said plaintiff then and there accepted and received the said indenture of and from the said defendant, in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid ; and the said defendant further saith, that the said annual sum of 120*l.* agreed to be paid to the said plaintiff, as in the said indenture mentioned, exceeds the rate of 5*l.* for the forbearance and giving day of payment of 100*l.* for one year, contrary to the form of the statute, &c. By means whereof, and by force of the said statute, the said indenture was and is wholly void in law.—Verification.

Demurrer and joinder.

Hutchinson for the plaintiff.— Nothing in this deed shews any loan of money at usurious interest, but merely the sale and purchase of an annuity. The covenant to insure the grantor's life, after the falling in of the three first lives, is in favour of the grantor, who might otherwise have been called on to pay the grantor additional yearly interest, in order to provide for a similar insurance by the grantee during the whole of that period. In *Cummins v. Isaac* (a), a transaction on a similar principle was distinctly before the court, without objection to

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(a) 8 T. R. 183.

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its legality. The grantee was there to be reimbursed any extra expence incurred in insuring the grantor's life if he left *England*. *Morris v. Jones* (a) recognizes the legality of a specific grant of an annuity in part secured to grantee by the grantor's assignment of policies previously effected on his life. Here an additional risk to the capital appears, for if the fourth life should fall within the thirty days and before the insurance effected, that measure could never be taken.

R. V. Richards for the defendant. — The covenant is usurious. Though grantees of annuities, for their own security, generally insure the grantors' lives, this is the first instance of an express covenant by the grantor to do so. Its effect is, that when three lives drop in, the grantee will have the benefit of the fourth surviving life to recoup the whole consideration of the annuity. Then, is this such a putting in jeopardy of the consideration of the annuity as amounts to a sale of an annuity, or is it any thing more than a mere loan of money? Here is no actual hazard, or 'mere casual bargain,' as in *Beddingfield v. Ashley* (b). There, *Ashley*, in consideration of 100*l.* covenanted to pay 80*l.* to every of the five children of G. who were then alive, and should be alive at the end of ten years, and bound himself by a statute in 500*l.* as a security. This was held no usury, for the hazard was great but that in ten years all, or some, would be dead; "but had it been that he should pay 400*l.* at the end of ten years, if any of them were alive, it were a greater doubt; or if it had been, that he should pay, at the end of one or two years, 300*l.* if any of the said children were then alive, that had been usury, for probably one of them would continue alive for so short a time." The risk

(a) 2 B. & C. 232.

(b) Cro. El. 741. See *Fountain v. Grymes*, Cro. Ja. 252. Bask. 26. S. C. *Roberts v. Trenayne*, Cro. Ja. 507.

must be actual and considerable, and not merely colourable (a). Thus in *Murray v. Harding* (b), *De Grey*, C. J. says, if illegal interest is to be paid, even on a reasonable possibility, the contract is usurious. So, *Richards v. Brown* (c) turns on the point of 'substantial risk.' The test is not, whether the contract *may* turn out advantageous to the grantor, as e. g. if the four lives should drop in three or four years' time, but whether there is a reasonable possibility of the consideration money being returned to the grantee by means of a contract effected by the grantor. Here the grantee is to have annuity interest during the three first lives, and is then to be secured in the return of the consideration money. There appears no sound distinction between money agreed to be repaid by the grantor, and money agreed to be procured to be repaid through his means and by application of his funds, through the medium of an insurance office. *Cummins v. Isaac* and *Morris v. Jones* turned on the requisites of memorials. The judgment of C. P. in the present case (d) turned on a defect in the affidavits. The contingency of the fourth life dropping before the thirty days elapsed, is too remote to form the substantial hazard requisite. He also cited *March v. Martindale* (e), and *Doe v. Gooch* (f).

Secondly, if the deed is not usurious on the face of it, the plaintiff should have taken issue on the corrupt agreement stated in the plea, so that a jury might have tried, whether the agreement was *bonâ fide*, or a cover for taking illegal interest, and therefore void under the statute. — [*Bayley* B. The defendant might have pleaded that the deed was executed by way of cover of the corrupt agreement, which would

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(a) See 2 Bla. Com. 461.

(b) Bla. R. 859.

(c) Cowp. 770.

(d) *In re Naish*, 7 Bing. 150.

(e) 3 B. & P. 154.

(f) 3 B. & A. 664.

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have raised that issue (a).]—In *Wilson v. Marsack* in K.B. the question, whether a *post obit* bond was usurious or not, was held a question for a jury. — [*Bayley, B.* There the whole money was to be returned by the borrower, who was to pay more than five per cent, though the principal was never in hazard.]

Hutchinson replied.

LORD LYNTHURST C. B.—This transaction does not appear to me to be a loan of money contemplated by the statute against usury; but the ordinary instance of a purchase of an annuity on lives, where the consideration money is put in hazard. Though a covenant to insure the grantor's life seldom appears in annuity deeds, because that insurance is generally effected by the grantee, the fact is always open to proof either by witnesses or on affidavit. The rate of insurance of the grantor's life is always an item calculated by the grantee, in order to adjust the rate of interest to be paid him by way of annuity. Then the only question is, Whether the covenant by the grantor, to insure his life, makes any difference? and I am of opinion that it does not. The case is the same as if an increased rate of annual payment had been stipulated for by the grantee, in order that *he* might effect the same insurance, and it makes no difference whether the insurance is effected, or the requisite premium is paid by grantee or grantor. Nor would the grantor be personally

(a) In *Gilpin v. Enderby*, (in Error) 5 B. & Ald. 954. defendant pleaded a corrupt agreement to lend and borrow money at usurious interest, and that the deed declared on was executed by way of shift, in pursuance of an usurious agreement. In *Grigg v. Stoker*, Forrest. R. 4. usury was not pleaded. In *Doe v. Brown and Others*, Holt. R. 295. Gibbs C. J. left it to the jury to say, whether an agreement by A. to re-purchase in fifteen months, at a considerable advance, premises then sold to B., and by B. to re-convey to A., was meant as a cover for usurious loan of money or not.

liable if, after having effected the insurance, the company did not pay.

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BAYLEY B.—The statute of usury (a) imposes a penalty for the taking for a loan of money above the value of 5*l.* for forbearance of 100*l.* for a year. Now, in its ordinary meaning, the word *loan* applies where the principal is not in hazard, and the money lent is to be returned. The statute goes on to enact, that all bonds, contracts, and assurances whatsoever, for payment of any money to be *lent* upon or for any usury whereby above five per cent. shall be reserved, shall be void. That in substance applies to the same case as the earlier part, *viz.*, to a loan. Now, if the return of the principal money is ever in hazard as between lender and borrower, it is not considered a loan; and if the borrower is not the person to return the money, but a third person is to repay it, though by instrumentality of the lender, that is not within the statute. Here it is by no means certain that the grantee will regain the principal. If the lives were reduced to two, who should happen to die within thirty days of each other, there would be no obligation to insure. It is impossible to say that such a hazard cannot arise; then, unless the agreement to insure be colourable to cover the real transaction, it will not be usurious. Now, that risk shews that it is not necessarily colourable. Again, let us investigate what sum must *of necessity* be derived from the borrower. Suppose, after the third life has lasted a long period, the insurance is effected, and the fourth life falls in shortly after, the whole consideration money will be regained by the grantee, but the grantor will have paid a very small portion of it in the shape of insurance premium. A covenant to insure a life, and to assign the policy, is very different from a covenant to repay, for in the

(a) 12 Ann. st. 2. c. 16.

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former case there is no personal responsibility for the payment. The substance of the transaction is the purchase of an annuity, and whether the insurance is effected by the grantor in the manner covenanted for, or out of an increased payment demanded by grantee, in order to secure the principal by that means, is of no importance. Again, the grantor might be a gainer by this transaction, for if the four lives fell in a few years, he might have only paid half the consideration, whether in the shape of annual payments to the grantee, or of premiums of insurance. Had the grantee insisted on the rate of insurance being added to the annual payments, a heavier burden would have been imposed on the grantor, who would then have had to pay the annuity increased by the rate of insurance during the whole period of the three first lives, as well as the fourth. *Morris v. Jones* cannot be distinguished from this case.

VAUGHAN B.—The plea avers that it was corruptly agreed between the parties, as in the indenture mentioned. Now, if the transaction were a loan, the argument for the defendant would have great force, but here the principal is in hazard. Thus, if the two last lives fell in at one time, as in the case of shipwreck, &c., and no insurance was effected, that would be no breach of the covenant to insure, unless it could be ascertained which life expired first. At all events, if the fourth life expired within the thirty days after the third death, and before the insurance effected, the grantee would lose his money. Nor is the grantor personally answerable for the repayment of the money, or for any default therein by the insurance office. He fulfils his agreement by effecting the insurance.

BOLLAND B.—This transaction is not a loan of money, and its genuine character is shewn by the words,

"grant, bargain, sell, and confirm," used by the grantor. Then, is it a colourable transaction merely? A lender of money by way of annuity may secure himself the repayment of the whole, by stipulating for annual payments of part: but here that security is effected by a prospective covenant to insure. In *Morris v. Jones*, the assignment of policies already effected on the grantor's life formed part of the security of the grantee of the annuity; but the fact, whether or not those policies were effected by the grantor, does not appear, and seems disregarded by the Court as immaterial. This case, then, falls within those decided as to the sale and purchase of annuities where the principal is put in hazard.

Judgment for plaintiff. (a)

(a) In *Grigg v. Stoker*, Forrest. R. 4. an agreement by seller to pay 12 per cent. to buyer on his share of the amount of purchase money of a ship, was held not usurious, though the seller covenanted to keep the vessel insured, and the buyer was to be entitled to his proportion of any sum recovered from underwriters.

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GLEDSTONE *against* HEWITT.

June 8.

DETINUE (b) for a promissory note delivered by the plaintiff to the defendant, to be redelivered by him to the plaintiff when he should be thereunto requested, with averment of a special request by the plaintiff to re-
 The gist of the action of detinue is the detainer, and the bailment in the declaration is in general immaterial. Therefore the defendant may set up in his plea a bailment different from that stated on the declaration, and the plaintiff, without traversing it, may shew that the detainer is wrongful, notwithstanding, without being guilty of a departure.

(b) This form of action, so eligible for recovery of specific chattels, with damages for their detention, has been superseded by trover in the other courts, on account of wager of law being applicable to detinue, though not to an action for uncertain damages. But this objection to detinue never applied in the Exchequer, where wager of law is not allowed. 1 Ch. on Pl. 4th ed. 103.

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deliver. (a) Another count on a supposed loss and finding by defendant.

Plea, that heretofore and before the exhibiting the bill of the said plaintiff in this behalf, to wit, on 1st *January* 1831, at &c. the said plaintiff delivered the said promissory note in the said first count mentioned to and deposited and lodged the said promissory note with the said defendant, to be by him kept as a pledge and security for the repayment of a certain sum of money, to wit, the sum of 50*l.*, then lent and advanced by the said defendant to the said plaintiff, upon the faith and security of the said promissory note, and which said sum of 50*l.* hath not at any time before the exhibiting the bill of the said plaintiff against the said defendant in this behalf been repaid to the said defendant, but still remains wholly due and unpaid to him the said defendant, to wit, at &c. Wherefore the said defendant hath from thence hitherto detained, and still detains the said promissory note in the said first count of the said declaration first mentioned, as he lawfully may for the cause aforesaid. — (Verification.)

Replication, that the said plaintiff after the said depositing and lodging the said promissory note in the said last plea mentioned with the said defendant as therein mentioned, and before the exhibiting the bill of him the said plaintiff against the said defendant in this behalf, to wit, on 1st *January* 1831, at &c. was ready and willing, and then and there tendered and offered to pay to the said defendant, the said sum of 50*l.*, and then and there required the said defendant to deliver up to him, the said last-mentioned promissory note, which he

(a) A special request seems necessary to be averred. See 7 *Wentw.* 636, 637. 5 *T. R.* 409. 3 *Bulst.* 297. 2 *Ch. on Pl.* (citing *Morg. Pleader*, 191.) *assumpsit* against bailee without reward, for not taking care of and re-delivering goods left in his care. But *Willes*, 118. 1 *New R.* 140. 3 *Woodd.* 106. *arc contra.*

the said defendant then and there wholly refused to do. Wherefore he prays judgment, and the said last-mentioned promissory note, or the value thereof as aforesaid, together with his damages, by him sustained on occasion of the detention thereof, to be adjudged to him.

Demurrer by defendant, shewing for causes, that plaintiff hath in his said replication departed from the said declaration, and relied upon a new ground of action, and that the said matters in the said replication alleged, do not support the said declaration, but are inconsistent with it.

C. Cresswell, in support of the demurrer. — The replication is a departure; for the matters stated in it not only do not support, but defeat the declaration. The declaration is on a contract of deposit or general bailment to restore the note on request, while the replication admits that it was not deposited for that general purpose, but on a bailment as a security for repayment of 50*l*. The replication should have traversed the special bailment stated in the plea, as in *Kettle v. Bromsall*. (a) In that case, as the delivery of goods to be kept safely is a different bailment from delivering to keep as the depositor's own, the material point of the plea was, the mode in which the goods were to be kept, and the replication took issue on it. Here, if the plaintiff had replied that he had not deposited the note with the defendant to be kept by him as a security, that would have traversed and been a proper plea. *Mills v. Graham*, (b) is a distinct authority, that this replication being founded on a contract essentially different from that in the declaration is bad. Though the plea was only *non detinet*, it was not disputed that the first count, which like this, stated a bailment of goods to be redelivered on request, was not supported by evidence of a bailment for

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(b) 1 New Rep. 140.

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a special purpose, and the plaintiff had a verdict on the second count, which alleged a supposed finding on evidence, that the goods came to the defendant's hands by wrong.

Wightman, *contra*, in support of the replication.—As a departure can only occur where a replication differs from the declaration in something material, variance in an immaterial matter will not amount to it. *Lee v. Rogers* (a). Then the question is, what is the gist of the action of detinue? If the bailment is the material matter of the action, then the demurrer is well founded, but if the detainer is so, the replication is good. Now the cases cited will be reconciled by holding, as in *Isaac v. Clark*, (b) and *Buller's Nisi Prius*, 50, that the detainer is the gist and cause of the action. *Brook's Abridgment*, tit. *Detinue*, pl. 50. is express that the bailment is not material or traversable, being mere inducement. It is very doubtful, whether the finding by which a defendant is alleged to come into possession of goods in detinue and trover is traversable, and where the evidence was, that he came by them wrongfully, that was held to support that averment. *Mills v. Graham*. (c) According to that case, if this defendant had pleaded the general issue, *non detinet*, and the plaintiff had shewn a special contract of bailment, he would have failed on the first count. The Court, however, doubted much whether the special bailment as alleged could be traversed; and *Chambre*, J. guards against its being considered his opinion that it might. Nether bailment or finding were there traversed by the plea of *non detinet*, and the case was decided on, the Court alleging a finding which exists in this case. Then is there a departure? If the detainer is the gist of the action, then the replication in

(a) 1 Lev. 110.

(b) 1 Roll. R. 120. cited B. N. P. 51.

(c) 1 New Rep. 140.

effect supports the declaration by shewing, that admitting the bailment stated in the plea, the detainer after the sum tendered was wrongful, thus treating the bailment as a general one, viz. that stated in the declaration. *Bateman v. Ellman* (a) is quite analogous to this case.

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Cresswell, in reply.—If the plaintiff states a contract, and then a wrong accruing from breach of it, he must prove *that* contract. The bailment may not have been generally traversed in detinue, but it has been so traversed, *Kettle v. Bromsall*. (b)—[*Bayley B.* Suppose in that case the plaintiff had declared generally, on a finding and wrongful detainer only, the replication would have been good. So here the plaintiff has replied, not to justify the declaration, but as treating the bailment as a general one.—Lord *Lyndhurst*. In the case cited a special bailment was set up by plaintiff, and the defendant's allegation of such special bailment pledged plaintiff to nothing more than proving the goods to be in the defendant's hands.]

The terms of delivery to the defendant are material, and as such it is sufficient for defendant to traverse them. The form of the declaration in *Bateman v. Ellman*, (c) does not make a request by the plaintiff to the defendant to re-deliver, absolutely necessary to be proved, for as soon as the day was passed the defendant was bound to deliver without request. The contest there was, on the evidence whether the agreement was for bailment or sale, and not on the terms of bailment. Detainer of the plate after condition performed might be a tort, but no objection was raised to the pleadings.

(a) Cro. El. 866.

(b) Willes, 628. 1 Roll. R. 394. *Pope v. Butler*, id. 128. *Isaac v. Clarke* acc. where it was material.

(c) Cro. El. 866.

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In *Mills v. Graham*, (a) Sir James Mansfield held the count on a general bailment to re-deliver on request not supported by proof of a bailment for a special purpose, viz. to do something to the goods. *Chambre, J.* says, if a bailment may be traversed, issue must be taken accordingly. Here the defendant having set up in his plea a contract of bailment inconsistent with that laid in the declaration, the plaintiff has not taken issue on it, but rests his replication on the contract stated in the plea. *Isaac v. Clark*, cited from Bull. N. P. is reported 1 Rolle's R. 59 and 126, and was in trover which certainly lies. [Lord Lyndhurst C. B. The declaration in *Bateman v. Ellman*, is on quite as special a bailment as if it had been that the plate was to be re-delivered on request.—*Bayley B.* Strictly the plea should have traversed it if that was material.

LORD LYNDHURST C. B.—The question on this demurrer is, Whether the replication is a departure from the declaration? The first count is in the ordinary form of a count in detinue, stating that the note was delivered to the defendant to be by him redelivered on request. We are of opinion that the detainer is the gist of the action of detinue, (b) and that the bailment is merely inducement to it. (c) So that if a defendant rests his case on a bailment of a different description from that on which the plaintiff declares, he does not traverse the bailment alleged in the declaration, but relies upon that stated in his plea as a separate ground of defence. Here, though bailments of a different nature

(a) 1 New R. 140.

(b) 38 Ed. 3. 1. acc. cited 1 Rol. R. 128. *Isack v. Clark*.

(c) So per Lord Coke in Co. Lit. 295. 2. "In an action of detinue by the bailment of another's hand, the defendant shall wage his law, because the detinet is the ground of that action, and the contract or bailment, though it be by another hand, is but the conveyance and not traversable."

are set up by the plaintiff and defendant, the plaintiff does not traverse the allegation in the plea, that the note was deposited as a pledge for a loan of money, but replies a tender to the defendant for action brought of the sum advanced, thus adhering to the main allegation of wrongful detainer made in the declaration. This, therefore, cannot be a departure. In *Kettle v. Bromsall*, (a) the bailment set forth in the plea, differed from that laid in the declaration, and passed it by without a traverse. The merits of that case depended on the various natures of the bailments pleaded, and the principle of our judgment is established by that decision. It had been before expressly determined on error in *Bateman v. Ellman*, (b) that the bailment stated in the declaration was immaterial to be proved. Judgment must therefore be entered for the plaintiff.

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BAYLEY B. — I am of the same opinion. This declaration states a delivery to the defendant of certain notes, to be re-delivered on request. From the nature of the action of detinue, the detainer is the gist of it, and the plaintiff must prove that he, at the time of the act of detainer committed, was entitled to a re-delivery of the article sued for, and that it was unlawfully detained by the defendant. That is all which is necessary for maintaining his action. He is not bound to shew how the articles came to the defendant's hands, whether by bailment, pledge, or other means. As the action of detinue is in tort, it is only necessary for the plaintiff to prove material allegations. Then, is proof of the averment, that the articles were delivered to be re-delivered on request," essential, in order to entitle the plaintiff to recover in this case? The plea states a delivery on pledge, viz. a different bailment from that in the declaration. If

(a) Willes, 118.

(b) Cro. Eliz. 867. See *Southcot v. Bennett*, Cro. Eliz. 815.

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the declaration were to be considered to bind the defendant to a contract of re-delivery on request, the plea should have concluded with a traverse of the allegation, that the note was delivered to the defendant on that condition. But the authorities shew that such a traverse is not the common course of pleading, and that, if it was, the defendant, on such a plea, must not only prove delivery in the terms he specifies, but that those terms give him a continuing right to withhold the note. The plaintiff may, in his replication, shew, that notwithstanding the terms of delivery alleged in the plea, the defendant is not entitled to detain the article; but the defendant is not to traverse the terms of delivery stated in the declaration. If the plaintiff does not mean to traverse the terms of delivery stated in the plea, he may reply, that notwithstanding the matters pleaded, the defendant continues to hold them wrongfully, and is guilty of a wrongful detainer; or he may deny the circumstances on which the defendant insists. *Bateman v. Ellman* (a). So *Brook's Abridgment*, tit. *Detinue*, pl. 50. "In detinue it is no plea that the plaintiff did not bail as laid; for the bailment is not traversable, and the defendant shall answer to the detinue," citing the Year-book, 3 H. 4. So *Dyer*, fol. 29. b. Detinue for forty quarters of wheat: the plaintiff declared simply that the defendant contracted to sell him that corn, thus stating a simple obligation by defendant to sell him that corn, and to insure him a delivery at all events. The defendant pleaded that plaintiff bought of him eighty quarters, upon condition that when the plaintiff came for it, he should pay immediately, or otherwise the whole to be void; and further said, that the plaintiff had received thirty quarters of it, and paid him for it, and at another day came and received ten quarters, and had not paid for them, and so the contract became void, praying judgment *si actio*, &c.; thus, not

(a) Cro. Eliz. 866.

traversing the contract in the declaration *simpliciter*, but going on to state circumstances to justify his withholding the residue of the corn. Then the question arose, whether the plea should not have concluded with this traverse, "without this that the contract was simple," as the defendant insisted on a conditional contract, and it could not be intended to be the same with that declared on. But the Court thought that ought to come from the other party who in that case was the plaintiff, "as if in assize, the tenant plead simply a feoffment of the plaintiff's ancestor, and the plaintiff replies that it was on condition by deed, the tenant shall say that it was made simply, without this, that it was on condition." So here, if the defendant insisted on a conditional contract, and the plaintiff's defence was, that there was no such contract, he ought to have stated it by way of replication. From this it appears that the statement in the declaration does not bind the plaintiff, but that he is at liberty to state afterwards any terms of bargain or delivery traversing those set up in the plea. The defendant must shew on the face of the pleadings, that the bargain, as he states it, justifies him in the detention of the goods, which is the gist of the action. Then the plaintiff may deny such contract, or, admitting it, may say, that notwithstanding it the detainer is wrongful. The bailment in the declaration in *Bateman v. Ellman* (a), like that in *Dyer*, is pleaded *simpliciter*, that several pieces of plate described were delivered to defendant, to be restored on the 17th May ensuing. On *non detinet* pleaded, the jury found specially that plaintiff was possessed of certain plate on 16th February, 36 Eliz. and by indenture with defendant bargained and sold it to him, upon condition that, if the plaintiff paid such a sum upon the 17th May following, the bargain and sale should be void; that, without doubt, was a finding of a bailment on different terms from those

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stated in the declaration. The jury, also, found payment of the money on the 17th *May* as stipulated, but also found a memorandum indorsed on the indenture by the parties on that day, that the plaintiff should have it again, if he paid such a sum on the 1st *June*; but the declaration was held well enough, though the delivery to the defendant, found by the jury, was not by the bailment as alleged on the declaration, but by bargain and sale by deed, "for the condition being performed the plaintiff ought to have the plate again, and then detaining it is a tort." It seems from that case that *non detinet* puts the whole declaration in issue. So in *Mills v. Graham* (a), the only plea was *non detinet*. *Bateman v. Ellman* shows clearly that the plaintiff is not tied down, at all events, to the terms of delivery laid in the declaration, but may, if necessary, explain them in his replication. *Kettle v. Bromsall* (b) is quite consistent with this principle, and is rather in favour of the plaintiff than the defendant. The second count was on a bailment to the defendant of some antiques therein described, to be safely kept and delivered to the plaintiff when required, and averred that defendant would not deliver, but detained them. If, on the bailment so declared on, the antiques were not kept safely against all accidents, the Court thought that the loss would fall on the defendant. The defendant, however, pleaded that the articles were delivered to him to take care of as his own, and to shew them to persons to ascertain their value, and that defendant, having them about him for that purpose, was robbed of them. Thus, if the articles were delivered to him on the condition stated in the plea, the robbery would be an excuse for the non-delivery, and the loss would fall on the owner. Whereas, if the allegation in the declaration, of delivering to be safely kept,

(a) 1 New R. 140.

(b) Willes, 118.

was a traversable part of it, which it was imperative on the plaintiff to prove, it should have been traversed by defendant. Instead of which the plaintiff replied, (traversing the plea) that he did not deliver them to defendant to take care of as his own; and on demurrer the replication was held good, because issue was taken on the material part of the plea, and the loss by theft would be an excuse, or the contrary, according to the terms of the delivery, viz. whether to be safely kept or to be kept as the defendant's own. *Coggs v. Bernard.* (a)

It is impossible to say that *Mills v. Graham* (b) contains any judicial opinion on this point. The first count there was in detinue on a bailment to be redelivered on request. The second, on a supposed loss and finding, as in trover. Plea *non detinet*. The proof being, that the goods were not delivered to the defendant on the terms stated in the first count, but for a special purpose, viz. to do work on; Sir *James Mansfield*, at *Nisi Prius*, held that count unavailable. The verdict was for plaintiff on the second count, and though the point, whether the finding was material to be proved, was much discussed at the bar, it was little touched by the court. The Chief Justice thought the allegation of finding in the second count supported by the evidence of the obtaining possession of the goods by fraud, and of their wrongful detainer after demand. He did not think the plaintiff bound to prove the bailment laid in the first count, saying, it may be observed, that no case has been cited to prove, that where the detention is wrongful the declaration may not always be supported on an allegation of finding, though perhaps in cases of special bailments, it may be fit to require that plaintiff should declare specially, yet I will not say that is necessary even in those cases. Mr. Justice *Chambre*, that well-

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(b) 1 New R. 140.

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known pleader, would not decide, whether a special bailment, if existing, ought to be alleged or not, or whether, if alleged, it might be traversed, but would not at all say that it might.

Thus the authorities seem to shew, that though a general bailment happens to be stated in the declaration, it is not an essential part of it, and that defendant may or may not make it material at his election, without being tied down to the terms he there states, and if he can prove that before that time, the defendant had wrongfully detained the goods, he will be entitled to judgment. I am therefore of opinion, that our judgment must be for the plaintiff.

VAUGHAN B. — I can add nothing to the judgments which have been delivered. Another authority that the bailment in the first count is not traversable will be found in the Year Book, 9 H. 5. 14. stated in *Brook's Abridgment*, tit. *Charters de terre et detainue de eux*, pl. 22. where the court held the count good, though the bailment laid was not found. The defendant was there charged on the possession.

BOLLAND B. — A departure only happens when the replication contains subsequent matter, which does not maintain the material allegation in the declaration. Now this replication in effect re-asserts the wrongful detainer there laid, that detainer being the whole gist and cause of action. *Lee v. Rogers* (a) corroborates our judgment.

Judgment for the plaintiff.

(a) 1 Lev. 110.

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DAVIES *against* MORGAN and Others.

TRESPASS for taking two pair of shoes, and converting them to defendants' use. Defendants were wardens of the cordwainers' company in *Haverfordwest*.

Pleas: 1st, not guilty; 2dly, as to the taking and converting the shoes, *actio non*. Because they say, that the town and county of *Haverfordwest*, from time whereof the memory of man is not to the contrary, hath been, and still is, an ancient town and county (a), and that the mayor, sheriff, bailiffs, and burgesses of the said town and county, from time whereof the memory of man is not to the contrary, until the making of the letters patent hereinafter mentioned, have been a body corporate and politic in deed, fact, and name, incorporated by divers names of incorporation, by charters and

A by-law of a corporation imposed a penalty on persons exercising trades in a town, not being free, with a power of distress in case of non-payment. Held, that though the by-law did not require a demand and refusal of the penalty before distress made, such demand and refusal must be stated in

pleading, and distinctly proved by the defendant at the trial, in order to sustain a plea justifying the taking goods for a penalty incurred under such by-law.

Held also, that such demand and refusal were not proved by the recital thereof in the warrant of distress put in by the plaintiff to connect the defendants with the acts of trespass.

Corporators are not competent witnesses to prove a custom of excluding strangers from exercising trades within the town, where a moiety of the penalty imposed by a by-law for breach of that custom goes to the corporation. So *semble*, though the moiety be granted away by them, by by-law, to a company.

An entry in a book of a company not incorporate, and purporting to be dated 1672, and to be a promise by one *F. S.* to pay a fine incurred by him for selling goods in a town, not being free thereof, is not evidence, without extrinsic proof who *F. S.* was, and in what situation he stood respecting the corporation.

Semble, that the declarations of deceased corporators are evidence by reputation of a custom to exclude strangers from trading in a particular town.

Semble, where a sufficient reason for a verdict exists in a material defect of proof by the failing party, the Court will not grant a new trial, though the verdict is against the other evidence in the cause, and the deficiency was not discovered at the trial.

(a) *Quere*; See 34 & 35 H. 8. c. 26. s. 124, 125. and 27 H. 8. c. 26. s. 17.

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letters patent of divers of the late kings and queens of *England*, and duly accepted, and the said mayor, sheriff, bailiffs, and burgesses, from the time of the making of the letters patent hereinafter mentioned, have been, and still are, a body politic and corporate, by the name of incorporation of the mayor, sheriff, bailiffs, and burgesses of the town and county of *H.* and which said body corporate, during all the time aforesaid, have had and enjoyed divers immunities and privileges from time to time ratified and confirmed by the charters and grants of divers of the kings and queens of this realm. And the said defendants further say, that from time whereof the memory of man is not to the contrary, until the making of the letters patent hereinafter mentioned, the mayor, sheriff, bailiffs, and burgesses of the said town and county of *H.* have been used and accustomed to make, and of right ought to have made, good and wholesome acts, constitutions, ordinances, and by-laws, as well for the better execution of the laws and statutes of this realm respectively made and ordained concerning the several trades, mysteries, and occupations of the several guilds, fraternities, and companies in the said town and county of *H.*, and for the well and orderly using and exercising of their respective arts and mysteries within the said town and county, the excluding of unfit persons, and unable in skill and ability, and also all foreigners and strangers, from the using of their several trades within the said town and county, without the allowance of the said several companies, and by such acts, constitutions, or ordinances, and by-laws, to impose reasonable fines and amerciaments on the offenders, and to levy the same by distress and sale of the goods and chattels of such offenders. And the said defendants further say, that from time whereof the memory of man is not to the contrary, there hath been, and still is, and during all the time

aforesaid ought to have been, and still of right ought to be, within the said town and county of *H.*, a certain company or fraternity, called the brotherhood, fraternity, or fellowship of the art, mystery, and occupation of cordwainers or shoemakers of the said town and county of *H.*, consisting of two masters and two wardens of the said company or fraternity, and of divers persons using and exercising the art, mystery, and occupation of cordwainers or shoemakers within the said town and county of *H.* freemen of the said company or fraternity. And the said defendants further say, that there now is, and from time whereof the memory of man is not to the contrary, there hath been a *certain ancient and laudable custom* used and approved of within the said town and county, that is to say, *That no person, except such as has been admitted a freeman of the said company or fraternity, hath sold, or hath had a right to sell, any shoes or slippers, or to set up or carry on the trade or business of a cordwainer or shoemaker within the said town and county of H. without agreement first to be made with the masters and wardens of the said company or fraternity for the time being, the fair-time of the said town only excepted.* And the said defendants further say, that heretofore, to wit, on the 20th February 1609, to wit, at *Westminster*, our late sovereign lord King *James the First*, king of *England*, by his certain letters patent under the great seal of *England*, (and which said letters patent not being in the custody, power, or controul, of the said defendants, they cannot now bring here into court) did, among other things, will and grant for him, his heirs, and successors, to the mayor, sheriff, bailiffs, and burgesses of the town of the said county of *H.*, that the mayor and twenty-four of the common council of the said county of *H.* for the time being, or the greater number of them, whereof the mayor for the time being to be one, thereunto assembled upon reasonable

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summons to be thereof publicly given by the mayor of the county of the town aforesaid, or by his commandments, shall have full power and authority from time to time to grant, constitute, ordain, make, and establish, such reasonable *laws*, statutes, decrees, and ordinances, in writing, as unto them, or the greater number of them for that purpose congregated and assembled, whereof the mayor for the time being to be one, should, according to their sound discretions, seem to be good, wholesome, profitable, and honest *for the good rule and government of the county of the said town, and of all and singular officers, ministers, and artificers, inhabitants and residents whatsoever within the said county of the said town for the time being*, and for the declaration in what manner and order the mayor, sheriff, bailiffs, and burgesses of the said county of the said town and their successors, and all and singular officers, ministers, artificers, crafts, inhabitants, residents within the county of the said town for the time being, shall behave, bear, govern, and use themselves, their offices, functions, mysteries, trades, and businesses, within the county of the said town and the liberties and precincts thereof, for the further public good, more perfect and civil government of the county of the said town, and victualling of the same, *and for other causes, things, and respects whatsoever, any way touching or concerning the county of the said town*: and his said late majesty, by his said letters patent, did confirm and grant unto the said mayor, sheriff, bailiffs, and burgesses, all such liberties, freedoms, immunities, and pre-eminences, as they had or enjoyed, either by force or reason of any former grants or confirmations then before made or granted by any of his said majesty's progenitors, kings and queens of this realm, or by reason of any usage, custom, or prescription used within the said town, whereof the memory of man was not then to the contrary, as by the said letters pa-

tent, reference being thereunto had, will more fully and at large appear, which said letters patent afterwards, to wit, on, &c., at the parish of *St. M., Haverfordwest*, to wit, at the parish of *R.* in the county of *P.* aforesaid (*a*), were duly accepted by the then mayor, sheriff, bailiffs, and burgeses of the said town and county of *H.* And the said defendants farther say, that heretofore, to wit, on the 13th *September*, in the 9th year of the reign of our late sovereign lord King *James* the First, at a meeting of the mayor and twenty-four of the common council of the said county of the town of *H.*, being thereunto assembled on a reasonable summons thereof publicly made by *W. T.* the mayor of the said town of the said county, Sir *J. P.*, Knight, &c. (twenty-three other names) then the common council of the said town and county, being so assembled, and whereof the said mayor was one, did in due manner make certain reasonable by-laws or ordinances for the good government and commonwealth of the said fraternity or fellowship of the art, mystery, and occupation of cordwainers or shoemakers of the said town and county of *H.*, and did thereby, among other things, declare, enact, and constitute, *that no manner of person or persons, being a foreigner and stranger, and notwithstanding he had been brought up and educated in the trade or mystery of cordwainers or shoemakers within any city, borough, or corporation town within this realm of England or principality of Wales and marches of the same, should thereafter be permitted or allowed to set up the trade or mystery of cordwainers or shoemakers, and be a free master within the county of the said town of H., unless the said person or persons were resident within the said town, and also had his testimonials witnessing the time of his ap-*

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(*a*) *Seemle*, the venue was laid in *Pembrokeshire*, in order to its trial by a jury of that county, and not by a jury of the county and town of *Haverfordwest*. See *ante* §87, note (*a*).

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*prenticeship, when and where and with whom he had served the time of his apprenticeship, and that he was and had been of good name and fame in the time of his apprenticeship and since, and that he shall and would not only compound and pay, or cause to be compounded or paid, to the wardens of the said company for the time being, to the use of the said company, the sum of 10*l.* for his freedom within twelve days next after his setting up the said trade of shoemaker within the said county of the said town of H., but also should, before his or their admittance into the said trade or mystery within the said county, bestow and be at the costs and charge of a breakfast upon the said company of cordwainers or shoemakers within the said county, unless such person did marry with the widow or daughter of any freeman of the said company, and upon such marriage such person to be admitted into the said company, paying 20*s.* for said freedom and a dinner; and if any such person or persons, lacking such testimonials, and not compounding with said masters and wardens in sort aforesaid for the time being, should and would enterprize and begin to occupy the said trade or mystery of shoemakers within the said county of the said town of H. and the liberties thereof, that then he should forfeit and lose for every day that he or they did so offend, 20*s.*; and the said mayor and common council of the said town and county of H. did, in and by the said by-law or ordinance, conclude and agree, publish and declare, that the wardens for the time being and their successors should from time to time ask, levy, receive, and take into their hands all and singular the fines, forfeitures, penalties, and sums of money appointed and ordained by the said last-mentioned by-laws, acts, and ordinances to be paid, and in case any of the said fines, forfeitures, penalties, or sums of money should not be paid by any person or persons on whom the same should fall out to be due, according to the true meaning*

of the said by-laws, at such days and times as the same should be due and payable, that then it should be lawful for the wardens of the said company for the time being and their successors, or one of them, to distrain the goods and chattels of such person or persons that by the true meaning of the said by-laws ought to pay the same and should refuse to make payment thereof, and the same distress to detain in their hands for the space of ten days then after, unless the said sum of money for which the said goods should be distrained were paid in the mean time, and upon payment thereof, and of such reasonable allowance for the meal and keeping of such goods and chattels as should be so distrained if the same were live chattels, as the same should be reasonably worth, to restore the same distresses unto the said party; and if the said person or persons which should be so distrained as aforesaid should not pay the sum or sums of money upon him or them imposed or to be due by the true meaning of that by-law within the said space of ten days next after such distress taken, that then it should and might be lawful for the said warden or wardens for the time being, from and after that time to cause the said distress to be indifferently valued and prized, and to sell the same for the best value that might be had for the satisfying of such sum or sums of money for which the said distress should be taken in sort aforesaid, and the overplus of the price and value of such distress, if any, were to restore to the person or persons whose goods were so distrained. And the said defendants further say, that before and at the said time, when and so forth, they the said *J. L. M.* and *R. H.* were the masters, and the said *W. J.* and *J. J.* were the wardens of the said company and fraternity, duly elected in that behalf. And these defendants further say, that the said plaintiff, before the time of committing the breach of the said by-laws hereafter mentioned, (to wit)

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on 16th *January*, 1830, at the parish of *St. M., H.*, (to wit) at the parish of *R.*, in the county of *P.* aforesaid, had notice of the said by-laws herein above mentioned; nevertheless the said plaintiff, in breach and violation of the said by-laws, lacking the said testimonials in the said by-laws mentioned, and not having compounded with the masters and wardens of the said company or fraternity in sort as in the said by-laws mentioned as aforesaid, and being a stranger within the meaning of the said by-laws and not a freeman of the said company or fraternity, did, on &c., at &c., enterprize and begin to occupy the trade or mystery of a shoemaker within the said county of the said town of *H.* for one day, the same not being the fair-time of the said town aforesaid, whereby he the said plaintiff became and was liable to pay to the said defendants, *W. J.* and *J. J.* as such wardens as aforesaid, the aforesaid sum of 20s. as and for a penalty in respect thereof. And the said defendants further say, that afterwards, (to wit) on, &c., at, &c., they the said defendants, *W. J.* and *J. J.*, so being such wardens as aforesaid, did demand of and from the said plaintiff the said sum of 20s. as and for such penalty as aforesaid; and because the said plaintiff being so liable as aforesaid, and having such notice as aforesaid, wholly refused and neglected to pay to the said defendants the said sum of 20s. so due and owing by him as aforesaid, and thereof failed and made default, and hitherto hath done and still refuses to pay the said sum of 20s. in violation and breach of the said by-law or ordinances, they the said defendants, *W. J.* and *J. J.* so being such wardens as aforesaid, and the said *J. L. M.* and *R. H.* as their bailiffs, and by their command, did at the said time, when and so forth, within the said town and county of *H.*, seize and take the goods and chattels in the said declaration mentioned as a distress for the said penalty so incurred by the said

plaintiff as aforesaid, and as such distress did keep and detain the same for the said time in the said declaration mentioned, the said plaintiff not having paid the said penalty, as they lawfully might for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned; without this, that the said defendants took the said goods and chattels in any other place than in the said town and county of *H.* — (Verification.)

3d Plea. Because they say that the said town and county of *H.*, from time whereof the memory of man is not to the contrary, hath been and still is an ancient town and county, and that the mayor, sheriff, bailiffs, and burgesses of the said town and county, from time whereof the memory of man is not to the contrary, have been and still are a body corporate and politic, incorporated and confirmed by the said letters patent in the said 2d plea mentioned, in manner and form as in that plea is mentioned; and the said defendants further say, that from time whereof the memory of man is not to the contrary, there hath been, and still is, and during all the time aforesaid ought to have been and still of right ought to be, within the said town and county of *H.* a certain company or fraternity, called the brotherhood, fraternity or fellowship of the art, mystery, and occupation of cordwainers or shoemakers of the said town and county of *H.* consisting of two masters and two wardens of the said company or fraternity, and of divers persons using and exercising the said art, mystery and occupation of cordwainers or shoemakers within the said town and county of *H.*, freemen of the said company or fraternity; and the said defendants further say, that the masters, wardens and freemen of the said company or fraternity during all the time last aforesaid, with assent, consent and agreement of the mayor and common council, or other the body of persons for the time being governors

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of the said town and county for the time being, have been used and accustomed, and still of right ought to make good and wholesome acts, constitutions, ordinances and by-laws, for the well ordering, using and exercising the said art, mystery and occupation within the said town, the excluding of unfit persons, and unable in skill and ability, and also all foreigners and strangers from the using and exercising the said art, mystery and occupation within the said town, without the allowance of the masters and wardens of the said company or fraternity, and by such acts, ordinances and by-laws to impose reasonable fines, and amerciaments upon the offenders, and to levy the same by distress and sale of the goods and chattels of such offenders; and the defendants further say, that from time whereof the memory of man is not to the contrary, *there has been, and still is, the ancient and laudable custom* in the said town and county, *as in the said 2d plea mentioned*; and the said defendants further say, that heretofore, to wit, on 1st *September* in the ninth year of our late sovereign King *James the First, the masters, wardens and freemen of the said company or fraternity for the time being*, to wit, at &c. *did* in due manner make certain reasonable by-laws or ordinances, for the good government and commonwealth of the said company or fraternity of the said mystery or occupation of cordwainers or shoemakers of the said town and county of *H.*, and did thereby among other things declare, enact and constitute (*stating the by-law as in 2d plea*); and the said defendants further say, that heretofore, to wit, on the 13th day of *September*, in the said 9th year of the reign of our late sovereign lord King *James the First*, at a meeting of the mayor and twenty-four of the common council of the said town of the said county of *H.* being thereto assembled upon a reasonable summons thereof publicly made by *W. T.* the mayor, Sir *J. P.*, &c. &c. (as in 2d plea) then the common council

of the said town and county of *H.*, being so assembled, whereof the said mayor was one, did in due manner confirm the said last mentioned by-laws; and the said defendants further say, that heretofore, and at the time when, &c. and so forth, they the said defendants, *William Jones* and *James Jacks* were the wardens of the said company or fraternity duly elected in that behalf: (allegations that plaintiff had notice of the by-laws, and committed breaches thereof, with traverse &c. as in 2d plea).
— Verification.

4th Plea. (Nearly similar to the 2d, but setting forth a different by-law made by the common council of the town for the regulation of the cordwainer's company, thus.)—and the said defendants further say, that heretofore, to wit, on 1st *October*, in the fourteenth year of the late Lady *Elizabeth*, late Queen of *England*, the mayor, sheriff, bailiffs and burgesses of the said town and county of *H.* did in due manner make a certain reasonable by-law or ordinance, for the good government and commonwealth of the said fraternity and fellowship of the art, mystery and occupation of cordwainers or shoemakers of the said county of *H.*, and did thereby amongst other things order and decree *that no stranger should come to sell within the said town and liberties any shoes, slippers, boots or buskins, without agreement first to be made with the masters and wardens of the said craft for the time being, the fair-time of the said town only excepted, on pain of forfeiting the sum of 20s. for as often as he or they should offend, to be levied by the wardens of the said company or fellowship for the time being, by way of distress of the goods and chattels of the said offender, which goods so distrained by the said wardens forthwith should be appraised by two or four burgesses of the said town, which prisement should be entered in the county books of the hundred court of H., before the mayor of the town for the time being, at the next court following,*

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and if the party which so offendeth should not avow against the said distress within fifteen days after the prisement, it should be lawful for the said wardens to sell the said distress, *and then the one-half thereof forthwith should be delivered to the mayor for the time being, and the said half so levied, should be bestowed afterwards to the most and best behoof and profit of the community of the said town aforesaid and burgesses of the same, and the other half of the said sum so levied should be afterwards distributed by the said consent, assent, advice and agreement of the masters and wardens of the said craft within the said town for the time being, or by the most part of them, to the maintenance of the said occupation, and towards the finding, relieving, and supporting of such poor, impotent and needy person or persons abiding within the said town, and who then or before that time had been dwelling and using the said craft, otherwise to the common box of the said occupation and brotherhood aforesaid*; and the said defendants further say, that before and at the said time when and so forth, they the said defendants *William Jones and James Jacks* were the wardens of the said company or fraternity duly elected in that behalf; and the said defendants further say, that the said plaintiffs aforesaid, and before the time of the committing the breach of the said last mentioned by-laws heretofore, to wit, on the 16th *January* 1830, at &c., had notice of the said last mentioned by-law; nevertheless the said defendant being a stranger and not a freeman of the said company or fellowship, without any agreement first made with the masters and wardens of the said craft for the time being, and in defiance of the said by-law, heretofore particularly mentioned, did heretofore, to wit, at &c. the same not being the fair-time of the said town, sell divers, to wit, ten pair of shoes within the said town of *H.*, whereby he the said plaintiff became and was liable to pay to the said defendants, as such wardens as

aforesaid, the aforesaid sum of 20s., as and for a penalty in respect thereof; and the said defendants further say, that afterwards, to wit, on the same day and year last mentioned, at &c., they the said defendants did demand of and from the said plaintiff the said sum of 20s., as and for such penalty as last aforesaid, and because the said plaintiff being so liable as aforesaid, and having such notice as aforesaid, wholly refused and neglected to pay to the said defendants the said sum of 20s. so due and owing by him as aforesaid, and thereof failed and made default in violation and breach of the said by-law or ordinance, they the said defendants so being such wardens as aforesaid, did at the said time and so forth in the said town and county of *H.*, seize and take the said goods and chattels in the said declaration mentioned, as a distress for the said penalty so incurred by the said plaintiff as last aforesaid, and which goods and chattels so distrained as last aforesaid, were appraised by two burgesses of the said town, and which prisement was then and there entered in the county books of the hundred court of *H.*, before the mayor of the said town for the time being, at the next court following the taking of the said goods and chattels; and because the said plaintiff hath not paid the said last mentioned penalty, the said defendants as such wardens as aforesaid, did detain and keep the said goods and chattels for the said time in the said declaration mentioned, as they lawfully might for the cause aforesaid, (*quæ sunt eadem*); without this that the said defendants committed the said trespasses at any other place than the said town and county of *H.*—(Verification.)

5th Plea. Setting forth the by-law of 14 *Elizabeth*, as in 4th plea, but stating it to have been made by the company of cordwainers, and in other respects like the 3d plea.

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Replications—Similiter to first plea. To the second, protesting that the town and county of *H.* from time whereof the memory of man is not to the contrary, hath not been nor now is an ancient town and county, and that the mayor, sheriff, bailiffs, and burgesses of the said town and county, from time whereof the memory of man is not to the contrary, until the making of the said supposed letters patent in that plea mentioned, have not been a body corporate and politic in deed, fact, and name, incorporated by divers names of incorporation, by charters and letters patent of the late kings and queens of England, and duly accepted, and that the said mayor, sheriff, bailiff, and burgesses, from the time of the making of the said letters patent, have not been, nor now are, a body politic and corporate, by the name of incorporation of the mayor, sheriff, bailiffs, and burgesses, of the town and county of *H.*, during all the time aforesaid, having and enjoying divers immunities and privileges from time to time ratified and confirmed by the charters and grants of divers of the kings and queens of this realm, as in the said second plea is alleged, and also protesting that our said late sovereign lord, *James* the First, king of England, did not, by his certain letters patent under the great seal of *England*, will and grant for him his heirs and successors, to the mayor, sheriff, bailiffs, and burgesses of the town of the said county of *H.*, that the mayor and twenty-four of the common council of the said county of the said town of *H.* for the time being, or the greater number of them, whereof the mayor for the time being should be one, being thereunto assembled upon reasonable summons publicly made by the mayor of the county of the town aforesaid, or by his command, should have full power and authority from time to time to grant, constitute, make, ordain, and establish, such reasonable laws, statutes, constitutions, decrees, and ordinances, in writing, as unto them, or the

greater number of them, for that purpose congregated and assembled, whereof the mayor for the time being should be one, should, according to their sound discretion, seem to be good, wholesome, profitable, necessary, and honest, for the good rule and government of the county of the said town, and of all and singular officers, ministers, and artificers, inhabitants, and residents whatsoever, within the said county of the said town, for the time being, and for the declaration in what manner and order the mayor, sheriff, bailiffs, and burgesses, of the said county of the said town, and their successors, and all and singular officers, ministers, artificers, crafts, inhabitants, and residents within the said county of the said town for the time being, should be, have, bear, govern, and use themselves, officers, functions, mysteries, trades, and businesses, within the county of the said town, and the liberties and precincts thereof, for the further public good, more profit, and civil government of the county of the said town, and the victualling of the same, and for other causes, things, and respects whatsoever any way touching or concerning the county of the said town, as in the said second plea is alleged; and also protesting that his said late majesty, by his said letters patent, did not confirm and grant unto the said mayor, sheriffs, bailiffs, and burgesses, all such liberties, freedoms, immunities, pre-eminences, as they had or enjoyed either by force or reason of any former grants or confirmations theretofore made or granted by any of his said majesty's progenitors, kings or queens of this realm, or by reason of any usage, custom, or prescription used within the said town, whereof the memory of man was not then to the contrary, as in the said second plea is alleged; and also protesting that the said letters patent were not duly accepted by the mayor, sheriff, bailiffs, and burgesses of the said town and county of *H.* as in the said second plea is alleged; and also protesting that

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the said *J. L. M.* and *R. H.* were not the bailiffs of the said *W. J.* and *J. J.* nor by their command, distrained, and kept, the said goods and chattels, in the said declaration mentioned, in manner and form as the said defendants have above, in their second plea, alleged for replication; nevertheless, in this behalf, the said plaintiff saith, that the said defendants, at the said times when and so forth in the said declaration mentioned, of their own wrong, and without the residue of the cause by them in their second pleas alleged, committed the said trespasses, &c. (concluding to the country.)

Replication to third plea, after protesting that the said town and county of *H.* from time whereof the memory of man is not to the contrary, hath not been nor now is an ancient town and county, and that the mayor, sheriffs, bailiffs, and burgesses of the said town and county, from time whereof the memory of man is not to the contrary, have not been nor now are a body corporate and politic, incorporated and confirmed by the said letters patent in the said second plea mentioned, in manner and form as in the said third plea is alleged; and also protesting that the said *Joseph Lloyd Morgan* and *Richard Hood* were not the bailiffs of the said *William Jones* and *James Jacks*, nor by their command distrained and kept the said goods and chattels in the said declaration mentioned, in manner and form as the said defendants have above, in their said third plea alleged,—*de injuriâ.*

Replication to fourth plea, after protesting that the said town and county of *H.* from time whereof the memory of man is not to the contrary, hath not been nor now is an ancient town and county, and that the said mayor, sheriff, bailiffs, and burgesses of the said town and county, from time whereof the memory of man is not to the contrary, have not been nor still are a body corporate and politic, incorporated and confirmed by the

said letters patent, in the said second plea mentioned, in manner and form as the said defendants have above, in their said fourth plea alleged — *de injuriâ*.

Replication to the last plea, after protesting as in the third plea — *de injuriâ*.

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At the trial before *Bolland B.* at the *Lent* assizes for *Pembrokeshire*, the plaintiff proved the warrant of distress (a), the taking and appraisalment of the shoes, and

(a) *County of the Town of Haverford-* } To *J. J.* and *W. J.* wardens of the company of  
west, to wit. } shoemakers for the county of the town of *H.*  
Whereas *W. Davies*, of the town of *P.* in the county of *P.*, cordwainer, was on the 16th *January* instant, by us, the masters of the company of shoemakers, known by the name or names of masters cordwainers and shoemakers within the county of the town of *H.* ordered to pay the sum of 20*s.* to *J. J.* and *W. J.*, the wardens of our said company, on or before the 23d *January* instant, being the amount of a penalty imposed by us, in pursuance of the power in us vested in and by a certain indenture of grant and confirmation of privileges, bearing date 1st *October*, 14th *Edw.* and made by the mayor, sheriff, bailiffs, and burgesses of the town and county of *H.* to the members of our said craft within the said town and county, on him the said *W. D.*, for exposing for sale in the market-place of the said town and county several pairs of shoes, and sold one pair to *M. J.* of *H.* aforesaid, on 16th *January* inst. the same not being the fair time of the said town, and he the said *W. D.* not being a member of our said company, and not having made any agreement with the masters and wardens of our said craft so to do. And whereas the said *W. D.*, having notice of our said order, hath refused to pay, and hath not paid, the said sum of 20*s.* pursuant thereto, and the same hath been fully proved before us—These are therefore to command you to levy the said sum of 20*s.* by distress and sale of the goods and chattels of the said *W. D.*; and we do hereby order and direct the said goods and chattels so to be distrained, to be prized by three burgesses of the said town, and the praisement to be entered in the county books of the hundred court of *Haverfordwest*, before the mayor of the said town, at the court next following such praisement. And we do further order and direct the goods and chattels so to be distrained and prized to be sold and disposed of within sixteen days after such praisement, unless the said sum of 20*s.* for which such distress shall be made, together with the reasonable charges of taking and keeping such distress shall be sooner paid. And you are also commanded to certify to us what you shall do by virtue of this our warrant. Given under our hands at *Haverfordwest* aforesaid, this 30th *January*, 1830.

*J. Ll. Morgan,* } Masters of the said Company.  
*Richard Hood,* }



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there rested his case. The charter of *James the First* to the corporation of *Haverfordwest*; the by-laws of 14 *Eliz.* and 9 *James 1.* with the grant by the corporation at large in 6 *Ed. 6.* to the guild of shoemakers, to be a distinct company, having masters and wardens, were proved. Old witnesses, not free either of the corporation at large or of the company, proved that persons not free of the company had been prevented from selling leather shoes within *H.* except on fair days, or by consent of the company. Leave so to sell shoes had been asked by non-residents, and refused.

It was left to the jury, 1st, Whether there had been any precedent immemorial custom of excluding foreigners from selling shoes, so as to warrant either by-law: 2d, Whether such by-laws existed as those pleaded. Verdict for the plaintiff.

The following classes of evidence tendered for the defendants, were rejected by the learned judge: 1st, The testimony of existing corporators of *H.* as well as members of the company of cordwainers; 2d, The declarations of similar persons deceased; 3d, The books of the company of cordwainers, containing the following entries:

“ *March the 31st, 1673.*

“ *Francis Symmons* was fined to 6s. 8d. for selling of a payer of shoes within the liberty of this town, and he being not a freeman and free of the corporation, has promised to pay the money the eighth day of *July* next, as witness his hand.

“ *Francis Symmons.*”

“ *5th November 1596.*

“ Distraigned from *Petro Pearse*, nine pair of shoes for comming to our towne contrary to our corporation, and 'praised to 6s. by us whose names are underwritten.

“ *Wm. Turner.*

“ *Jas. Shards.*”

A rule for a new trial having been obtained principally on the ground of the verdict being against evidence, the plaintiff not having given any evidence respecting the usage pleaded, the above points were also included in the rule.

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*Sir W. Owen* and *Shepherd* shewed cause. — A privilege of excluding foreigners can only exist by custom in corporations by prescription, and cannot be granted by charter; so that a by-law to that effect is bad, unless to enforce a precedent custom by penalty (*a*). The jury found that no such custom existed, thereby referring all the acts of exclusion proved by the defendants to the mere authority of the by-laws. But if the by-laws are bad in point of law, and the plaintiff would consequently be entitled to judgment *non obstante veredicto*, or in error, had the defendants obtained a verdict, the court will not grant a new trial. Selling a pair of shoes in a market seems not to be a setting up in trade within the second and third pleas. The corporation at large had not power to erect the company of cordwainers into a corporation (*b*). That the company existed immemorially as a corporation, so as to warrant it in making the by-law relied on in the third and fifth pleas, is not proved except by the recital in the by-law itself, and is negatived by the verdict.

The by-law in the reign of *Elizabeth* stated in the fourth and fifth pleas, is bad, viz. in giving part of the penalty to the corporation of *H.* who are strangers to the company of cordwainers; that company not being a corporation, but a mere private fraternity, not necessarily composed of corporators; *Totterdell* and another

(*a*) See the cases collected 1 Saund. 312, c. note (3), and *Mayor, &c. of York v. Welbank*, 4 B. & Ald. 438.

(*b*) See 10 Coke, 29. a.

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v. *Glasby* (a). *Bodwic v. Fennell* (b). Then, if the stranger has a right to half the penalty, they have a right to the costs. — [Bayley B. The distinction between those cases and the present is, that the by-laws there gave a stranger a right to sue, which was held illegal, as being an assignment of a chose in action; whereas here no right to sue is conferred by granting the privilege of distress, though part of the penalty when recovered is to go to a stranger.—] (c). The evidence of existing corporators and members of the company was properly rejected, for these bodies are entitled to half the penalties incurred by breach of the by-laws, nor does the minuteness of the interest vary the rule (d).

(a) 2 Wils. 266.

(b) 1 Wils. 233. 237.

(c) In the *Devises* case, *Bodwic v. Fennell* (in Error), 1 Wils. 233. See C. J. *Dennison* and *Foster* Js. all rely on the illegality of a corporation assigning to a stranger by a by-law a right to sue for the penalty. *Hollings v. Hungerford*, a Bristol case, E. 3 G. 1. cited 2 Wils. 235, 6. and *Totterdell v. Glasby*, 2 Wils. 266. the *Bath* case, 3 P. No decision appears that the application of that penalty to the use of a stranger is illegal, if it is to be recovered by the corporation itself. *Wright J.* in *Bodwic v. Fennell*, seems to take it as *Serjeant Williams* has since done, 1 Saund. 312. c. note 3. as if there was no difference between a by-law giving a stranger the mere right to sue thereon, and a by-law by which no such right being given, the corporation themselves must sue for the penalty, though a portion of it, when so recovered, is applied to the use of a third person. *Wright J.* says, "The only difficulty with me is, that the penalty is given to a stranger. In *Player v. Archer*, (City of London case, 2 Sid. 105.) it appears a by-law was made, giving a moiety of the penalty to a stranger, (viz. to the maintenance of Christ's Hospital, London.) If they could do that, why may they not give away the whole to a stranger? The chamberlain of London is as much a stranger to the right as any other person, and where is the unreasonableness of giving the penalty to a stranger? In public laws it is very common, and almost always done. This is a point of great consequence, and requires further consideration."

(d) *Burton v. Thirsk*, 5 T. R. 174. *Dowdeswell v. Nott*, 2 Vern. 317. Bull. N. P. 290. which seem to overrule *Rex v. Mayor, &c. of London*, 2 Lev. 231. *R. v. Carpenter*, 2 Show. 47. Case of City of London, 1 Vent. 351. *Norwich Weavers' Case*, Vin. Ab. Evidence, G. pl. 3. *Townsend v. Row*, 2 Sid. 109. See *Stark. Ev.* Part IV. 777. 1 Phill. Ev. ch. 5. s. 1, 2. and *Doe d. Mayor of Stafford v. Tooth*, 3 Y. & J. 19.

The books of the cordwainers' company were properly rejected. They were not public or even corporation books coming from recognized custody, but mere private entries. Therefore *Rogers v. Allen*, (a) where manor-books were admitted to shew licenses of fishery from the lords of the manor, does not apply. The entry relied on is entirely for the interest of the party producing it, nor does any of the company charge himself with any receipt on account of it. *Rex v. Debenham*. (b)

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The hearsay evidence of declarations of deceased corporators was properly rejected; though admitted in order to prove payment of modus and extent of wastes. The present claim is of a different nature, resting on daily user, so that the *lis mota est* in every instance of excluding foreigners from trading.

*John Evans* and *E. V. Williams* in support of the rule. First, the verdict was against all the evidence given in the cause. The custom laid was proved by witnesses as far as living testimony could extend. Evidence of preceding reputation was thus let in, and the recital in the by-law of 9 *Jas.* was consistent with the rest of the defendant's evidence. Secondly, the testimony of the corporators was admissible in evidence, they being deprived of the moiety of the penalty on trading by strangers, conferred on them by the by-law of 14 *Eliz.* — [*Bayley B.* Either by-law may be repealed at any time. —] No corporator was *ipso facto* free of the company, or could sell shoes in the town without such freedom. The evidence of corporators has been admitted *ex necessitate* for proof of public rights. *Norwich Weavers' Case*, (c) *Rex v. Mayor, &c. of London* (d); *Rex v. Carpenter*. (e) Thirdly, the declara-

(a) 1 Campb. 309.

(b) 2 B. & A. 185. *Bayley, J.*

(c) *Vin. Ab. Evid. G. pl. 2.*

(d) 2 Lev. 231.

(e) 2 Show. 47. 1 Vent. S. C. but see *ante*, 476. n. (d)

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tions of deceased corporators and members of the company, are evidence by reputation of the rights of both bodies. In *Moseley v. Davies*, (a) and *Deacle v. Hancock*, (b) the fact of payment of a modus was to be proved, and the declarations of deceased parishioners liable to pay tithes, that so much an acre was always paid in lieu of tithe in their time, were admitted. The supposed analogy between the evidence of living and the declarations of deceased witnesses, disappears when the principles applicable to both are investigated. A living witness can only speak to facts within his knowledge, and not to the existence of right; but the declarations of a deceased witness must also account for the facts they state, by ascribing their occurrence to a reputation in the last age that certain rights existed. (c) Though in *Moseley v. Davies* the authority of *Harwood v. Sims* was detracted from by the judgment of C. B. Richards, he, with the court, substantially affirmed its doctrine. Deceased parishioners have ever had as daily an interest in keeping down the claims of a rector, as freemen of this company can have in excluding strangers from trading in their town. *Nicholls v. Parker* (d) was a question of manorial boundary. As no controversy existed at the time of uttering the hearsay, *Le Blanc*, J. admitted as evidence of reputation the declarations of old persons deceased, though claimants of rights of common over the wastes which their evidence went to enlarge. Here the rejected declarations would have shewn that it was reputed in the last age that the custom alleged had always existed.—[*Bayley* B. Can the right here claimed be called public, so as to let in evidence of re-

(a) 11 Pri. 162.

(b) M'Lell. R. 85. 13 Pri. 226. S. C. See also *Harwood v. Sims* 11 Pri. 170. n. Wightw. 112.

(c) See per Macdonald C. B. *Harwood v. Sims*, Wightw. 112.

(d) 14 East, 331. n. See Bul. N. P. 230. Doug. 319. 4 M. & S. 491.

putation under *Reed v. Johnson?*—](a) It seems as public as the question of the boundary of a manor.

4. The company's books were improperly rejected. The entry of March 1672, purports to contain a promise to pay a fine against the interest of the party signing.—[*Garrow B.* How could that promise be enforced without also proving the immemorial custom and right of the corporation to take this sum by way of consideration? The entry is not like that of a receipt of money by a deceased accountant.—] It is evidence of reputation that a stranger to the company had committed an offence, and is consistent with the by-law.—[*Lord Lyndhurst C. B.* It is not proved *aliunde* who *Symmons* was, or that he was a stranger to the corporation or company. For all that appears, he might be a member of both, and therefore interested. If he was a mere stranger, his evidence of reputation would be worth little. Here, however, the evidence is offered as proof of the fact that a stranger had personally acquiesced in the charge, unaccompanied with proof *aliunde* of any tradition or in consequence of any reputation on the subject. In *Higham v. Ridgway*, (b) the man-midwife had relinquished the claim for work, which he would have had, had he not erased the charge from his book. (c) — *Bayley B.* It cannot be taken from the entry itself that he was a stranger. Thus in the *Berkeley Peerage Case*, (d) a deposition by a person deceased respecting others, there stated to be members of his family, and made in a cause in which the latter sought to perpetuate testimony of legitimacy, was offered as evidence of reputation, viz. as a declaration on the subject of the pedi-

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(a) 1 East, 356. See 1 Ph. Ev. ch. 7. s. 7. 6 Ed. 238. and *ante*, 337. note (b)

(b) 10 East, 109.

(c) See *Middleton v. Melton*, 9 B. & C. 317. same principle.

(d) 4 Campb. *sub fin.*

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gree of the persons so named in the deposition. The judges held that the fact of relationship to the deponent's family, could not be taken from the deposition itself, but must be proved *aliunde*, and by sources *dehors* itself. So in the *Banbury Peerage Case*, (a) a bill in chancery filed by a person alleged to be a relation, was held no evidence to prove pedigree till the relationship of that person to the party whose birth is in question, was proved by extrinsic evidence.]

Cur. adv. vult.

LORD LYNTHURST C. B. afterwards delivered his judgment. — One question which was raised in this case was, whether or not there was any demand of the penalty which was supposed to have been incurred previous to the distress? (b) The justification pleaded, rests upon two by-laws, one made in the reign of *Elizabeth*, and the other in the reign of *James* the First. The 2d and 3d pleas are founded on the by-law of the reign of *James* the First. The 4th and 5th on that of the reign of *Elizabeth*. In the by-law of the reign of *James* the First, a demand and refusal previous to a distress is expressly provided for in the very terms of the by-law. No such demand is required on the face of the by-law of the reign of *Elizabeth*, which is the foundation of the 4th and 5th pleas, but according to a form very usual in cases of this kind, it is said, that in consequence of the offence, or when the offence is committed, the party shall be subject to a penalty, to be levied by distress. However, notwithstanding the circumstance of no demand being expressly made necessary by the terms of that by-law, I am of opinion that it is necessarily to be implied. If that be so, it brings us to the consideration of this record in the first

(a) 2 Sel. N. P. 685.

(b) This point was raised by the Court at the time of shewing cause.

instance. As far as relates to the 2d and 3d pleas, the by-law states the necessity of a demand previous to the distress, and in the averment in each plea it is expressly stated, that there was a demand and refusal, in consequence of which demand and refusal the distress issued, In like manner, in the 4th and 5th pleas, though upon the face of the by-law itself, no demand is required in terms, yet the pleadings are framed on the opinion that the distress would not be lawful unless a previous demand had been made. It is accordingly stated in those pleas, that the penalty was demanded and refused, and that the distress issued as the consequence of that demand and refusal. In all the precedents which I have consulted of declarations framed on by-laws, like that of the reign of *Elizabeth*, I find that previous to the distress a demand and refusal is averred. It appears to me that it was necessary in this case to aver such a demand and refusal, as has been done. The question then arises, was there in this case any sufficient evidence of a demand of the penalty, and of a refusal to pay it? On the part of the defendant no evidence was given for this purpose, but it is notwithstanding said that the plaintiff had given sufficient evidence of that fact by putting in the warrant of distress which issued, and which recites a demand and refusal. It is urged, that as the plaintiff himself made use of the warrant of distress containing that recital, that warrant as taken against the plaintiff afforded *prima facie* evidence of a demand and refusal. I am of opinion, however, that the use of the warrant of distress for the purpose for which the warrant was produced by the plaintiff, not by way of admission of the recitals, but in order to connect the defendants with the trespass, by shewing the act of some of them in directing the goods to be taken by the others, affords no evidence for the defendants of the truth of the facts recited in that warrant. I am also of opinion, that a demand and refusal was neces-

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sary in this case previous to the distress, and therefore, that, notwithstanding the plaintiff put in evidence the warrant, it was necessary on the part of the defendant to give distinct evidence of the circumstance, that there had been a demand and refusal previous to the levying of the distress. If that be so, there was no evidence to sustain any of the justifications stated on this record, and under those circumstances, the jury were not only justified in pronouncing their present verdict, but would have been wrong in pronouncing any other. It appears to me, therefore, impossible to grant a new trial.

This view of the subject renders it unnecessary for me to enter minutely into the consideration of the other points raised in the argument. I am of opinion that the evidence of the burgesses was properly rejected, as interested in the event of this suit, and that the corporation books were inadmissible in evidence for the purposes for which they were offered. I am also of opinion, that if the attention of the judge had been called to the particular entry which was intended to be offered in evidence, so as to raise the question of its admissibility, that entry would not have been evidence without previously offering evidence for the purpose of shewing who the individual was who subscribed that particular entry, and in what situation he stood. Had that been done so as to make his admission evidence, then the lapse of time would have dispensed with the necessity of proving the handwriting (a). But as no evidence was offered for the purpose of shewing who that individual was, I am of opinion, that if the attention of the judge had been called to that particular entry, still it could not under the circumstances have been offered in evidence.

With respect to the declarations of the deceased burgesses, after considering the cases of *Moseley v. Davies*,

(a) *Wynne v. Tyrckhill*, 4 B. & A. 376. but see *Manby v Curtis*, 1 Pri. R. 225.

Deacle v. Hancock, Harwood v. Sims, Nicholls v. Parker, and The King v. Inhabitants of Debenham, I should have hesitated to refuse the evidence. On the first point, I am of opinion, that this rule must be discharged.

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BAYLEY B.—I am entirely of the same opinion, and I have the authority of my brother *Garrow* to state that he concurs in it. The only point upon which I entertain the least doubt, is whether the declarations of deceased burgesses could have been admissible in this case. The cases to which the Lord Chief Baron has referred, are powerful authorities on that subject, and although, if the evidence had been admitted, I should have thought it to add very little weight indeed in this case to the other evidence given by the defendants; yet if it had been necessary to have come to a definitive conclusion upon that subject, and if I had been satisfied that they ought to have been received in evidence, I do not think we could properly have refused to grant a new trial, because in other respects the by-laws might be bad in point of law. But upon the point that no demand was proved in this particular case, I am of opinion that the verdict for the plaintiff was right, and ought not to be disturbed. The warrant was put in evidence to prove that the defendants had all concurred in making the distress in question, and stated the grounds on which they professed to act in making that distress; but, put in as it was for these purposes, it is to my mind no evidence at all of the truth of any of the parts contained in it. If it were, it might equally have been proof of the existence of an immemorial custom, or of a by-law, or of any other fact necessary to exclude the plaintiff from maintaining the presumption, and recited on the face of it. The by-law in the reign of King *James*, directs in terms that there shall be such a demand. On that by-law, therefore, there is no question. The by-law of the 14 *Eliz.* does

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not in terms say there shall be a demand of the money before the distress is made; but I am of opinion, either that a necessity to make such a demand must be implied from the nature of this by-law, or if not, then I think the by-law would be bad, as being unreasonable under the circumstances of this case. This is a by-law by which a penalty is to be paid, not by a person resident in the town, and therefore of necessity cognizant of its local usages, but by a stranger, who comes not to set up shop, but to sell, viz. to use the market for the sale of shoes, among the other common purposes for which strangers are at liberty to use it. Now it is alleged in the pleadings that the plaintiff had notice of the by-law; but there is no evidence of that fact. I think some proof of notice of the existence of a by-law ought to have been given before the period at which the penalty might be enforced by way of distress, and if from the situation in which he stands he is not of necessity apprised of the existence of any such by-law, or of his being liable to any such penalty, I am of opinion the by-law in that case would be considered as unreasonable, unless it be taken to imply the necessity that there should be a demand of the penalty before the distress should be made. Among other cases applicable to this point, there is a precedent in *Lutwyche* (a) of a plea of justification in a case of this sort. The by-law there relied on, was that there should be an annual meeting for the purpose of electing the master and wardens of a particular company at *Lichfield*, that there should be a dinner, and that the different members should contribute to bear its expense—that if any member should be absent, he should pay his proportion, and if he should neglect so to do, should pay a fine of 3s. 4d. to be levied by distress. (b) They state that

(a) Pa. 1320.

(b) See Cro. Ja. 555.

the plaintiff was a brother, that he absented himself, and did not pay, and that he forfeited the 3s. 4d. This allegation then follows, (not required in terms by the by-law, but as it was in my opinion necessary to make the by-law reasonable, it is implied from the nature of the by-law itself) that the master and wardens requested him to pay, which he refused, and that thereupon they distrained. The question which was agitated in that case, does not bear upon the merits of this, and therefore, it is not necessary further to state the decision. I merely mention it to prove that in that case, as in this, although the by-law did not in terms direct that the money should be demanded, yet there was an express and distinct allegation in the pleadings of a demand of the money. In *Clarke v. Tucke*, (a) there was a by-law that any member of a corporation of a company of tailors at *Exeter*, who should revile the master and wardens should pay a penalty of 3s. 4d. to be levied by distress. It is then stated that the defendant being a member, had reviled the master and wardens, *per quod* he had forfeited 3s. 4d. which was demanded of him, and he neglected to pay. In *Davenant v. Hurdis*, (b) there was a by-law that every member of the company who had work to be done, should give a portion of that work to members belonging to the company, and if he should not he should forfeit 10s. for every *mete* of cloth, with reference to which there should be such neglect; and then they state he had cut out twenty pieces of cloth, and thereby forfeited the sum of 20*l*. There, though the by-law does not direct any demand of the money before it shall be levied by distress, it is stated at the conclusion, that the plaintiff refused to pay the forfeiture, and therefore, the master and wardens made out a warrant of distress. On these authorities I am

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(a) 2 Ventr. 183.

(b) *Moor*. 576. cited 11 Rep. 86. *Carter*, 116. See 2 Inst. 47.

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of opinion that the by-law would be bad, circumstanced as this case is, if it did not imply the necessity of a demand before any distress could be made; and inasmuch as in this case no demand was proved at the trial, we ought not to disturb the verdict.

VAUGHAN B. not having been present at the argument, and BOLLAND B. having tried the cause, declined to deliver any opinion.

Rule discharged.

See *Brown v. Dunnery*, Hobart, 208. *Howell v. Sambach*, id. 133. and *Grobham v. Thornborough*, id. 82. See also Moor's R. 357. *Mound's case*, 7 Co. 28. b. and cases there cited, note (e).

June 9.

SMITH and Another *against* BROWN.

A bill for business done by attornies in partnership, and signed in the name of the firm, without adding their christian names, is sufficient within the statutes 3 J. c. 7. s. 1. and 2 G. 2. c. 23. s. 23.

ASSUMPSIT by the two plaintiffs (attornies) for the amount of their bill incurred before the dissolution of their partnership, for obtaining a bankrupt's certificate against opposition by creditors. At the trial before *Vaughan B.* at the last *Westminster* sittings in term, it appeared that the bill in the hand-writing of the plaintiff *Smith*, had been delivered a month before the action was commenced, concluding thus :

" This, and the foregoing two pages, contain our bill.

(Signed)

" *Smith and Jaye.*

" 10th January 1831."

The plaintiffs had a verdict.

John Williams had obtained a rule for entering a non-suit on the ground that the bill contemplated by 3 J. 1.

c. 7. and 2 G. 2. c. 3. s. 23. had not been delivered; for that the christian name of each attorney not having been signed, the signature in the name of a firm, was not sufficient. He cited *Hill v. Humphries* (a), *Collins v. Treweek* (b), *Taylor v. Fenwick* (c).

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Talfourd shewed cause. — Stat. 3 J. 1. c. 7. applies only to business done in *suits*. This bill, as it contains one item, being a proceeding in a court, viz. an application to the chancellor for his signature to the certificate, is therefore taxable, and must be delivered according to 2 G. 2. c. 23. s. 3. (d), but is not a “charge concerning a suit,” within 3 J. 1. c. 7. s. 1. As that act does not require the Christian name to be signed, signature in the name of the firm satisfies it. Thus 2 G. 2. c. 23. s. 22. requires the “name of the attorney,” suing out a writ to be indorsed thereon (e). But in practice, where a partnership issues a writ, the name of the firm has been hitherto indorsed, without any instance of the process being set aside for irregularity. In the instance of a notice of action against a magistrate, the name of the attorney is required, in similar terms by 24 G. 2. c. 24. s. 1. to be indorsed. *Mayhew v. Locke* (f) shews that it is sufficient in indorsing the attorney’s name to put the initial only of his Christian name, thus “D. Shuter.” In *James v. Swift* (g), the initials only of the Christian names of two attorneys, partners in a firm, were prefixed to their surnames in a similar indorsement, and though the initials were incorrect, one being omitted, the indorsement was held sufficient, and *Holroyd J.* thought the act not requiring all the names of the attor-

(a) 2 B. & P. 243. 3 Esp. 254. S. C.

(b) 6 B. & C. 390.

(c) 7 T. R. 635. n.

(d) *Collins v. Nicholson*, 2 Taunt. 321.

(e) See also 7 & 8 G. 4. c. 71. s. 8.

(f) 7 Taunt. 63. 2 Marsh. 377. S. C.

(g) 4 B. & C. 631.

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nies to be inserted, but merely the *name*, did not require a christian name. Then, even if 3 J. 1. c. 7. applies to business done by attornies, though not in a suit, it only requires the *name* in the singular, and *James v. Swift* applies. The signature "*Smith and Jaye*" is an abbreviation usual and intelligible, within 12 G. 2. c. 13. (a)

J. Williams, in support of the rule. — This bill is not signed as required by 3 J. 1. c. 7. s. 1. which enacts that all attornies shall give a true bill unto their masters or clients, of all charges concerning the suits which they have for them, subscribed with his own hand and name. Now, the Christian name is a part of the name here required. Stat. 2 G. 2. c. 23. s. 3. requires the bill to be subscribed with the *proper hand* of such attorney, and to be delivered one month before action commenced. Thus the hand and name of each attorney who is to sue are required by the above acts. Here *Jaye* has not signed. Had it been signed by *Smith* "*John Smith for Smith and Jaye*," or "*Smith and Co.*" it might have been otherwise. The recital of 3 J. 1. c. 7. carries the provision of that act further than suits pending, viz. to fees for counsels' opinions, &c. The latter part also of sect. 1. embraces all charges, whether in a suit or court, or not. In *Mayhew v. Locke*, the notice was signed at length, *David Shuter*, though only indorsed *D. Shuter*, yet it was not without discussion that the bare indorsement "*D. Shuter*," was held to satisfy the act. The delivery of an attorney's bill operates as a notice (b), and the language of statutes requiring notices has been adhered to strictly. *Hill v. Humphreys* (c). In *Taylor v. Fenwick* (d), a notice of action against a magistrate, signed by an attorney,

(a) 4 Taunt. 193. *Reynolds v. Caswell*.

(b) *Per Bayley, J. Colling v. Trowack*, 6 B. & C. 394.

(c) 2 B. & P. 243. 3 Esp. 254. 8. C.

(d) 7 T. R. 635. n.

thus: "Given under my hand at *Durham*," was held bad, as it gave no intelligence of his abode. The terms of the statute must be essentially, as well as literally, complied with, and no equivalent is sufficient. Stat. 3 J. 1. c. 7. is in force (*a*), and applies to attornies in partnership, as strongly as to persons practising singly.

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BAYLEY B. (*b*) — I take it for granted that both 3 J. 1. c. 7. and 2 G. 2. c. 23. are in force, and regulate this case. The first act requires all attornies to give unto their masters or clients a true bill of all charges concerning the suits which they have for them, subscribed with *his* own hand and name. The second requires the signatures by the proper hand of the attorney. The question here is, what is the name of the attornies who are plaintiffs, and what is meant by stat. 3 J. 1. c. 7. by *his* name. Each of these plaintiffs may have a christian and surname, which, in one respect, is his name; but as in bills of exchange accepted by a partnership, acceptance by one partner in the partnership name, style, or firm, prevails, and that name so signed, is, in every instance, applied to the *name* of business of those parties, and not to the individual name of each partner, so it seems to me here, that this bill is sufficient, being signed in the proper business name of *Smith and Jaye*, by which they are known in the profession, and carry on their dealings. The stat. 2 G. 2. c. 23. s. 22., in quite as distinct terms requires the name of the attorney suing out process to be indorsed thereon. But in ordinary practice the name of the firm is indorsed on process issued by attornies practising in partnership, and has been hitherto considered a sufficient indorsement of the name of that firm of which it is composed. *Smith and Jaye* is the proper business name, and being partners, each might subscribe

(*a*) *Heming v. Wilton*, M. & M. 529.

(*b*) Lord *Lyndhurst* was sitting in Equity.

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the name of both for partnership purposes, *e.g.* for debts to the firm, incurred before its dissolution.

VAUGHAN B. — I am of the same opinion on the construction of both statutes. The ordinary course of signing in the partnership name is not calculated to mislead, and conveys as much information as the christian name would give.

BOLLAND B. — I am of opinion that the subscription to this bill is sufficient to satisfy the acts cited. The cases of notices to magistrates are manifestly distinct. The magistrate must be informed who is the party complaining, that he may go to him or his attorney, and tender amends. The court, by requiring the residence of the attorney to be inserted, does not go far to establish the christian name to be necessary; and in *Mayhew v. Locke*, the attorney *Shuter's* place of abode being pointed out, the notice was held good. The object of delivering an attorney's bill one month before action brought is in order to give the client notice to pay without suit. Now, if this defendant did not know the firm of *Smith and Jaye*, he would take no notice of the bills delivered, and if he did he might get the bill taxed.

Rule discharged.

HALL v. GUMPLE and Another.

Partners in trade, resident at *Hambergh*, had a warehouse in *Manchester*.

Service of *venire*, by leaving it with their servant at the warehouse, was held not sufficient to ground a *distringas* to levy issues in order to compel their appearance; and a *distringas* which had issued was set aside with costs.

R. V. RICHARDS had obtained a rule in Easter Term to set aside a *distringas* for irregularity, with costs to be paid by the sheriff of Lancashire, and to re-

store the money raised under the process. On 31 *January*, the *venire* was left at a warehouse in *Manchester* belonging to the defendants, with their manager. The defendants have no dwelling-house in this country, and reside at *Hamburg*. On 23d *Feb.* the defendant not having appeared, a *distringas* issued, indorsed to levy 40s. The plaintiff did not proceed according to 7 & 8 G. 4, c. 71. s. 5, but on the previous practice of the court, assuming that statute to have no operation over exchequer process. It however did not appear that in compliance with that former practice, the *venire* which was not personally served, had been sent to the sheriff in order to his serving a summons on defendant, or that he had returned, that he had caused defendant to be summoned, or that the defendants had in fact been summoned personally or otherwise.

Clarke before shewing cause was asked by the court if he had considered the application of 7 & 8 G. 4. c. 71. s. 5. to the case?

The *Master* certified the ancient practice that upon a sheriff's returning the names of the bailiffs commanded by him to summon the defendant, and filing that return, the *distringas* issued, though not as the act of the court.

R. V. Richards supported the rule on this point. Since *Pitt v. Eldred* (a), the rule there laid down in pursuance of the statute respecting personal service of *venire*, has been strictly adhered to. *Winstanley v. Edge*, (b) *Godkin v. Redgate*, (c) and *Whitehorne v. Simone*. (d) The books of practice do not confine the service of the summons to personal service. (e) *Manning's Practice* says, (p. 19) that the bailiff on receiving a sheriff's warrant to summon the defendant, summons him by delivering a copy

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(a) *Ante*, 129. (b) *Ante*, 276. (c) *Ante*, 287. (d) *Ante*, 293.
(e) *Tidd's Pr.* 9th ed. 155. *Manning, Pr.* 18. 23.

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to him; or in his absence, by leaving it at his house with some adult member of the family, or the person with whom he lodges. It is at all events reasonable that a *distringas* should not issue before the defendant has notice of the process.

LORD LYNTHURST C. B.—Assuming that a return of the summoners has been duly filed in this case, and that that fact appeared on affidavit, it would not vary the argument that it was an irregular return unsupported by the facts. The effect of the practice is, that the *distringas* issues against a party in the first instance, without any necessity for personal service of a summons. That is contrary to principle.

VAUGHAN B. — The issuing a *distringas* proceeds on the contempt of court in non-appearance after service of its process. Then that service should be personal service, or facts should be shewn to the court previous to its issuing the *distringas*, that the party kept wilfully out of the way to avoid it.

BAYLEY B.—The 7 & 8 G. 4. c. 71. s. 5, is similar to 51 G. 3. c. 124. in this particular. The latter act while in force has been held to extend to process issuing out of this court. (a) Assuming 7 & 8 G. 4. c. 71. s. 5. not to have a similar operation, the court would be bound to regulate the practice by analogy to it. But the plaintiff has not here dealt with the non-appearance of the defendant as a contempt of the court. The course adopted may have been usual, but if it is to prevail, *Pitt v. Eldred* (b) must be overruled, and the motions usual for writs of *distringas* under the statute are misplaced. In *McNabb v. Ingham*, (c) a *distringas* was moved for under

(a) *Moore v. Taylor*, 5 Taunt. 71. n. *Ante*, 201. n.

(b) *Ante*, 129.

(c) 2 Pri. 9. M. 1815.

51 G. 3. c. 124. and refused on the ground of the insufficiency of the service of the *venire*.

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On the other point *Clarke* urged against the rule, that if the service on the defendant's accredited agent at their warehouse here was not sufficient, foreigners incurring debts would have undue advantages: he mentioned *Petty v. Smith and Another*. (a)

Richards contra.—Neither of the defendants reside in this country. In *Petty v. Smith* several partners resident in *Liverpool* were jointly liable, and all were personally served except one who was abroad, so that service at the partnership counting house was held sufficient to found a *distringas quoad* their goods, the inference being that the partners personally served were cognizant of the claim. (b) No decision took place on the application of 51 G. 3. c. 124, though the point was raised by *Parke* for the defendants. (c) The question has generally been, whether when a single defendant residing here was abroad, service of the summons at his abode was sufficient, and *Brier v. Lansdown*, (d) and *West v. Dalton*, (e) are in the affirmative. In *M'Nabb v. Ingham* (f) service of a *venire* by leaving it with a clerk at the counting-house of two defendants, who

(a) 2 Y. & J. 111. H. 1828.

(b) *Derryhouse v. Graham*, 3 Pri. 266. n. *M'Murdo v. Birch*, 5 Pri. 523. S. P.

(c) So in *Birdwood v. Hart and another*, 3 Pri. 176. one of two partners was personally served, and the partner who was abroad when the writ was left at his residence here, received it on his return, seven weeks before the attachment issued. Held sufficient service. In *Carrington v. Cantillon*, Bunb. 107. service of subpoena on one partner was held good service on his partner then in France.

(d) Bunb. 67.

(e) *Forrest*. 29. see also *Caulin v. Lawley*, 2 Pri. 12.

(f) 2 Pri. 76.

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though from home were in England was held insufficient to support a motion for a *distringas*. (a)

The return of *summoneri feci* by the sheriff not appearing to have been filed,

Cur. adv. vult.

It was afterwards produced, and on 10th June

BAYLEY B. delivered the judgment of the court.—All the judges of the court have considered this case, and inasmuch as the defendants against whom the *distringas* has issued, have no place of residence in this country, their home being abroad, the rule must be absolute with costs, the defendants undertaking to bring no action.

(a) *Mensies v. Rodrigues and others*, 1 Pri. 92. service of a subpoena on one of several defendants, by leaving the label (see now Reg. Gen. M. 1 W. 4. *contra*) at defendant's counting house, is not sufficient, unless given to a partner or some acknowledged clerk there.

In *Nicholson v. Bowness and Hall*, M. 1816. 3 Pri. 266. this court held that 51 G. 3. c. 124. had made no other alteration in the old practice of *vanire* and *distringas*, than that a plaintiff should not be allowed to use the proceeding of *distringas* as a preliminary step to entering an appearance for a defendant when abroad, and then carrying on the suit as if he had appeared. and refused the *distringas* on that ground, but said, if it were only to be used for the purpose of compelling an appearance, by distraining on him till he should appear, they saw no reason why it should not issue in the usual course.

The other cases in which, since 51 G. 3. c. 124. and 7 & 8 G. 4. c. 71. the plaintiffs have been permitted to proceed according to the old practice of the court of Exchequer, are *Kemp v. Sumner*, 2 Y. & J. 405. T. 1826, and *Petty v. Smith and another*, id. 111. II. 1826.; but in *Kemp v. Sumner*, the generality of the words of the latter statute do not seem to have urged, and see the next case, *Pennell v. Kingston*.

Nor will the C. P. since 51 G. 3. grant a *distringas* against a defendant who has gone abroad, without proof of his absenting himself with intent to avoid process. *Jordan v. Pello*, 5 Taunt. 703. 1 Marsh. 292. S. C. In *Goldsmith v. Leoy*, E. 1812. 4 Taunt. 299. it was held in C. P. that since 51 G. 3. c. 124. the only mode of proceeding against two, where one is abroad and the other will not appear for him, but for himself only, is by proceeding to outlawry against him who is abroad. Before 51 G. 3. service of the summons at the defendant's dwelling-house was held sufficient

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PENNELL *against* KINGSTON.

June 11.

MEESON moved to increase the issues on a *distringas*, issued on 31st May to levy 40s., to such amount as the Court should think fit. — The action was on a bill by indorsee against the acceptor, not being a member of parliament. Plaintiff relied on an affidavit of debt, and that no appearance had been entered in time with the return of the levy made on the first *distringas* annexed. He said that the plaintiff proceeded, not on the stat. 7 & 8 G. 4. c. 71. s. 5. but on the ancient practice by which after summons of the defendant returned by the sheriff, a *distringas* might issue to levy 40s., and the issues thereon might be afterwards increased on motion. He cited *Petty v. Smith and another (a)*, and *Kemp v. Sumner (b)*.

The court will not increase the issues on a *distringas* sued out without complying with the stat. 7 & 8 G. 4. c. 71. s. 5.

Per Curiam (c). — Those cases do not dispose of the difficulty arising from the regulations of 7 & 8 G. 4. c. 71. s. 5. respecting writs of *distringas*. It is unnecessary here to express any opinion on the point, whether that statute supersedes those writs when issuing at common law or not; but assuming that it does, the Court cannot be a party to increasing issues, under a writ which it might afterwards be called on to supersede, in pursuance of an express enactment on the subject. A plaintiff may obtain a *distringas* in compliance with the act; if he does not, he must proceed at common law of his own authority, as he shall be advised.

Rule refused.

to support a *distringas*, though the defendant was absent abroad. *Staines v. Jehannot*, 1 B. & P. 200. In *Morley v. Strombon*, 3 B. & P. 254. a *distringas* issued against partnership goods, to compel appearance by two of the partners who were abroad, see *Greaves v. Stokes*, 1 Taunt. 485. *Gurney v. Hardenberg*, id. 487.

(a) 2 Y. & J. 111.

(b) Id. 405.

(c) Lord Lyndhurst C. B. *Bayley, Vaughan, and Bolland, B.*

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May 31.

THOMAS *against* ELDER.

Semble, a *distringas* should not issue till the 8th day after the day on which the *venire* is made returnable.

WHITE, on 25th May, moved for, and obtained a *distringas*, under 7 & 8 G. 4. c. 71. s. 5. on an affidavit (*a*), stating circumstances from which the Court

(*a*) The affidavit stated that the deponent did, on 23d May (the return-day), serve the defendant with a true copy of the *venire*, by delivering it to a man at his dwelling-house, who informed the deponent that he was foreman of the defendant, and which deponent believes. That deponent having several times previous to 23d May attended at the dwelling-house of the defendant for that purpose, but without meeting with the said defendant, on 10th May called to serve him with the writ, and saw a female servant, who informed him the defendant was from home, but that they had been expecting him back for the last hour. That deponent waited an hour to see him, but could not, and the servant refused to inform him where defendant could be found. That deponent attended again on 12th May at the same dwelling-house for the same purpose, and saw the foreman, who said that the defendant was out, but would be at home soon, and refused to inform deponent where defendant was; whereupon deponent waited at the entrance of defendant's yard and dwelling-house, but could not see him, but deponent, while he was so waiting, was informed by a man *standing there*, that the said defendant was at home, for he had seen him a few minutes before go in, and he had not come out again. And this deponent saith, that he called again at the said dwelling-house of the said defendant on the 17th of May, to serve him with the writ, when the deponent saw a female, who told him she was the wife of defendant, and informed him that defendant was not at home, but refused to inform deponent where he was; and deponent told same female he would call again on the following Friday morning at ten o'clock. And deponent believes said defendant was then at home, for deponent saw in the room from which said wife came a man, who appeared to deponent to be said defendant, and who deponent verily believes was said defendant. And deponent says that he did on Friday morning, at ten o'clock, (20th May) call again at the dwelling-house of said defendant, and again saw said female, who represented herself to be, and whom this deponent believes was, wife of *J. E.*, who informed deponent that *J. E.* was not at home, but down at *Epsom*, and said she hoped the plaintiff would not press his demand against *J. E.*, for he was in great difficulties, and it

inferred, that the defendant kept out of the way in order to avoid personal service of the *venire*. The writ was returnable 23d *May*. Defendant resided in *Middlesex*. He now mentioned, that the officer of the Court hesitated to issue the writ, considering the motion on the 25th *May* to be premature, and that eight days must elapse after the return of the *venire*, before a *distringas* could issue: viz. four days for appearing to the *venire*, and four days for appearance to the summons; and that eight days must then elapse after the return of the *distringas*, before the plaintiff could enter an appearance for the defendant under the statute. *White* contended, that nothing in the act (*ante* p. 289) prevented a *distringas* from issuing immediately after the return of the *venire*,

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would be impossible for him to pay, and if it was pressed, he must go to prison. Deponent, 21st *May*, called again at same dwelling-house, and saw the foreman of *J. E.*, who told deponent that said *J. E.* was not at home, but refused to inform him where he was, but said he was in the neighbourhood. And deponent then told him he would call again on Monday morning at ten o'clock, for the purpose of serving said writ on said *J. E.* That he did so call at said dwelling-house, and see said foreman, who again said *J. E.* was not at home, whereupon defendant went away, and called again at said dwelling-house about four o'clock of the same day, and saw again same foreman, who informed deponent said *J. E.* was out, and it would be uncertain when he would be in, and refused to inform deponent where he was, or when he could see him. And deponent says, that from the above circumstances, and from information which deponent has received from his various and diligent inquiries after said *J. E.*, this deponent verily believes *J. E.* was either at home and refused to be seen, or kept out of the way to avoid service of said writ; and thereupon deponent left a copy of said writ with same foreman, and at the same time shewed him the said original, under which writ was a notice, &c. And deponent says, he verily believes it will be impossible to serve said *J. E.* with a copy of any *future* writ to be issued against said *J. E.* And deponent further says, that he also with another clerk of *J. H. T.*, attorney for plaintiff, in *Michaelmas* term last attempted to serve said *J. E.* with copies of two prior writs issued against him at suit of said plaintiff, for the same cause of action, but after every endeavour for the purpose, deponent and said other clerk found it impossible to serve such copies on said *J. E.*, who also on those occasions kept out of the way, to avoid such service, as this deponent verily believes.

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though he admitted that eight days must elapse after the return of the *distringas*, before the appearance can be entered.—[*Bayley B.*—*Reddendo singula singulis*, the words “eight days after the return thereof,” apply to the return of the *distringas*.]

The *Court* said, that at the time of making the motion, their attention had not been directed to the circumstance, that it was made within eight days after the return of the *venire*, but that they had a discretion under the act to postpone issuing the *distringas* if moved too soon. Without expressing any general opinion on the point, they gave leave to issue the *distringas* as of this day, the 8th after that on which the *venire* was returnable.

Writ issued accordingly.

The following cases elucidate that of *Pitt v. Eldred*, ante, 129.

June 11.

Requisites of affidavits in order to found a *distringas*.

DOBELL v. KING.

M. D. Hill moved for a *distringas* under 7 & 8 G. 4. c. 71. s. 5. The plaintiff's attorney called on defendant, telling his purpose, and saw his wife, who said, coming there was no use, and that she would not tell where the defendant was.

BAYLEY B.—The affidavit should have stated the question, from the answer to which it can be fairly inferred that the defendant was in town.

Time given to amend the affidavit.

Same day.

Horton made a like application.—Three calls had taken place at the defendant's house before the return of the writ. At the first call the defendant's son was seen, and informed by the clerk that he would call again the next day at ten o'clock, to serve the *venire*. He called accordingly, and saw the servant, who said all the family were out of town except the eldest daughter, whom she promised to inform of it. The clerk made another appointment for the next day, and went accordingly a third time, when the servant said the family were all gone to *Scotland*, and that the daughter knew nothing about it. He went again on the return-day of the writ, when the servant asked how much the debt was, and ridiculed the attempt to recover it.

BAYLEY B.—All which is stated to have happened is consistent with the family being gone to *Scotland* before the last call. If you can collect from the answers given, that the defendant was really at home or in the neigh-

DOE *against* ROE.

May 24.

JOHN Jervis moved for judgment against the casual ejector. *Sunday* the 22d *May* was the first day of term, and service of the declaration on one tenant in possession, was on the 19th, and another on the 20th. Stat. 1 W. 4. c. 3. s. 3. provides that where the *last* day of term falls on a *Sunday*, the *Monday* after is to be deemed the last day of term. The 19th was said to be the *essoin* day in K. B. but he admitted the service on that day would be too late. He also urged that this ejectment being by *bill*, the judgment had reference to the first day of the term, though in other courts, in ejectments by original, the judgment refers to the *essoin* day.

Service of declaration in ejectment since 11 G. 4. and 1 W. 4. c. 70. s. 6. and 1 W. 4. c. 3. s. 3. when the first day in full term falls on *Sunday*.

Service of rule for judgment on tenant in possession, after an irregular service of a declaration in ejectment on the *essoin* day.

LORD LYNDEHURST C. B. — I never understood that there was any distinction in the practice.

BAYLEY B. — I believe the judgment in ejectment by

bourhood, three calls would be sufficient; but we are not informed what replies were given to the inquiries made on the first and second occasions. However desirable it may be not to embarrass plaintiffs, where proper grounds are stated for our inference that defendants keep out of the way to avoid service of process, no such grounds are stated here.

Motion refused.

Richards moved for a *distringas*, on an affidavit stating, as cause for dispensing with personal service of the *venire*, that different accounts had been given by the defendant's wife and servant, at the defendant's residence, on several occasions, of his absence at *Portsmouth* and elsewhere.

BAYLEY B.—The mistress and servant may have given accounts differing in words, but I see no substantial variance between them, allowing for the different times at which they were elicited. No affidavit is produced that any person has seen the defendant in the neighbourhood.

Rule refused.

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original only refers to the first day in full term (*a*). If there is no distinction between the commencement of a suit by bill and original, then the rule cannot be granted. Ejectments are sometimes commenced by bill in the King's Bench (*b*).

On the 26th *May*, *J. Jervis* renewed his motion on an affidavit that the attorney believed the essoin day to be on the 20th, upon which

The COURT held the 19th to be the essoin day, but directed that the rule for judgment should be served on the tenants in possession, on whom the declaration had not been served before that day.

Rule granted, unless cause shewn in five days after service of the rule for judgment on tenant or tenants in possession, or on one of several joint tenants.

May 31.

C. Cresswell moved for judgment against the casual ejector under similar circumstances. He said that, in consequence of the difficulty under stat. 1 W. 4. c. 3. the K. B. had declared on a similar application, that judgment should not be signed for five days after serving the rule for judgment on the tenant in possession, who had thereby an opportunity to come and object to it; so that the rule for judgment was to be served, instead of searching at the office to see if the judgment is signed.

Rule granted as in last case.

(*a*) See *Doe d. Davies and Wife*, 1 B. & C. 118.

(*b*) But original writ is the preferable course, as the declaration may then be amended by the writ, *Roe v. Ellis*, 2 Bla. R. 940.; and common bail are not required for the casual ejector. Tidd, 9th ed. 1224.

See now *Reg. Gen.* post, 524, by which declarations in ejectment may be served before the first day of any term with the same result as if served before the essoin or first general return day.

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SIMONS *against* FOLKINGHAM.

June 2.

SIR W. Owen shewed cause against a rule for judgment as in case of a nonsuit, on the ground that the motion was made too soon.—The issue was joined in a country cause in *Hilary* term, but no notice of trial was given for the *Lent* assizes. It was held in *Redward v. Way* (a), that a defendant cannot *now* move for judgment as in case of a nonsuit in the next term after issue joined, on the ground of the plaintiff not having proceeded to trial, unless there has been laches on the part of plaintiff, or unless notice of trial has been given, and the plaintiff has neglected to proceed to trial accordingly. He cited *Reg. Gen. E.* 1824 (b), made in consequence.

In a country cause, issue being joined in *Hilary* term, if the plaintiff does not give notice of trial at the assizes after that term, the defendant cannot in *Trinity* term move for judgment as in case of a nonsuit.

BAYLEY B.—No notice of trial having been given for the assizes after *Hilary* term, the plaintiff has not been guilty of default in not proceeding to trial then. The rule of court cited does not apply. The plaintiff was not bound to give notice of trial for those assizes, or to try till the assizes next following *Easter* term, being the term succeeding that in which issue was joined. Then this rule has been moved prematurely, and is in substance the same as a motion for not proceeding to trial at the Spring assizes.

Rule discharged. (c)

(a) 13 Pri. 453.

(b) 13 Pri. 454.

(c) *Acc.* in *K. B. Miller v. Hassall*, T. 9 G. 4. Supplement to p. 764. of *Tidd's Practice*. Issue was joined in a country cause, and the issue

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DUCKET *against* WILLIAMS.

Since 1 W. 4. c. 22. s. 4. a commission may issue to examine witnesses in any place out of the jurisdiction of the courts of law, on motion in that court of law in which the action shall be pending.

R. V. RICHARDS, had obtained a rule on the part of defendant, under stat. 1 W. 4. c. 22. s. 4. for a commission to examine witnesses in *France*, and that the trial of the cause might be stayed till the return of the commission, on an affidavit that the material witnesses resided in *France*. A plea had been pleaded, but issue had not been joined.

Sedgwick, now shewed cause. — And relied on s. 1. that the commission could only issue to the King's dominions and judges of courts therein.

BAYLEY B. — Many cases having arisen where it was highly desirable that commissions should issue for examination of witnesses in foreign countries where there are no *British* judges. Section 4. was enacted to enable that to be done by the instrumentality of a court of com-

entered in Hilary, viz. an issuable term; but no notice of trial was given either in *Hilary* or *Easter* term, and in *Trinity* term following a rule nisi for judgment as in case of nonsuit was obtained, but was afterwards discharged by the court, who said there had been no substantial default, and the application was premature. This case seems to dispose of the doubt expressed in *Tidd*, 9th ed. 764. n. as to cases when the issue has been entered in the term of which it is joined.

So in *Spiers v. Parker*, Hil. 1830. 1 C. & J. 18 n. issue had been joined in the Exchequer in an issuable (*viz.* *Trinity*) term, plaintiff was not therefore bound to try at the next assizes, and a rule for judgment as in case of nonsuit, obtained in *Hilary* term, was consequently abandoned. However, in *Crowley v. Dean*, 1 C. & J. 18. where issue was joined in a term not issuable, *viz.* *Michaelmas*, and plaintiff did not give notice of, or proceed to trial at the assizes after *Hilary* term, the defendant was allowed in *Easter* term to move for judgment as in case of a nonsuit, the plaintiff having been guilty of default.

mon law, which could only previously be done in equity, or by consent. Suppose a foreign ship insured in *England*, is wrecked on a foreign coast, and the evidence of foreign witnesses is desirable; or, that a party similarly insured resides and dies abroad, out of the dominions of the crown, and that it becomes material that foreign medical men, knowing the state of his health, should be examined as to the point, whether the life was insurable or not, the necessary examinations may be obtained under that section at a small expense. By 1 W. 4. c. 22. s. 1. the act 13 G. 3. c. 63. as far as relates to the examination of witnesses in *India* is extended to all "places under the dominion of his majesty in foreign parts, and to the *judges* of the several courts therein;" and had the act of *Will. 4.* been confined to such places, section 1. would seem an adequate provision, without making any provision for examining witnesses except in places where the king has courts. But by sect. 4. of that act, the superior courts of law may "order a commission to issue for the examination of witnesses on oath, at *any place* or places *out of the jurisdiction of the Court where the action shall be depending*, by interrogatories, or otherwise, and by the same or any subsequent order or orders [may] give all such directions touching the time, place and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending, as without, and all other matters and circumstances connected with such examination as may appear reasonable and just." Then why is the construction of these words to be limited to the king's dominions? Does necessity or natural justice require us to limit their *prima facie* extent? I am of opinion that such a restriction would cause this act to fall short of the beneficial consequences intended by the legislature. The act may not be obligatory on a court, to grant a commission if circumstances should be pointed out,

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which shewed its issue to be improper, but no such grounds are suggested here. On this construction of section 4. it is reasonable, that a commission to examine witnesses should be issued to a place where the king has no courts.

GARROW B.—I entirely concur. Were the construction of this act contended for by the plaintiff to prevail, the previous difficulties in administering justice in courts of common law, without the assistance of courts of equity, would continue. A case may be easily suggested in which the beneficial effects of section 4. would appear. The cargo of a ship sailing homeward from a foreign port has been insured in this country, and is lost. The question whether she had taken in a homeward cargo, could only be solved by examining witnesses at the port of loading; a purpose which may now be attained with greater ease and economy. The increasing intercourse of this country with the rest of the world has long made this enactment desirable. The parties before whom the examinations are taken, will cross-examine the witnesses at their discretion, and The plaintiff may if he pleases join in the commission.

VAUGHAN B.—This is a beneficial law, which should receive a liberal construction in advancement of the remedy intended. The general terms of section 4. would be nugatory, if it were construed by mere analogy to sect. 1. The Court has a discretion under s. 4. to grant or refuse a commission as they see just.

BOLLAND B.—It is impossible not to see that the policy of the act is to avoid the difficulty in which either party, being desirous to examine witnesses abroad, must be without this act. For unless the other side consented, he must have gone to a court of equity, and if a

defendant, must have moved to stay proceedings in the court of law. It may frequently occur, that persons who would be unwilling to visit this country, may be ready to give their testimony, if examined abroad, and the parties are not to be ousted of the remedy which the law allows them, but must take the risk, if the result of the commission should turn out to be immaterial.

Rule absolute to issue the commission.

It was intimated, that if the parties could not agree on the time of its return, and other terms, another order would be applied for under section 4. (a)

(a) The following case occurred in K. B. on the last day of Trinity Term. *Reynard v. Cope*.—The plaintiff was a foreigner, in prison. The defendant had obtained a rule under 1 W. 4. c. 22. s. 4. for issuing a commission to take interrogatories in *France*.

Cause being shewn on s. 1. alleging want of jurisdiction, Lord *Tenterden* said there could be no doubt but that a distinction existed between s. 1. and s. 4. and that it would be limiting the commission too much to make it part of the order that it should be returned in three weeks.

The commission was directed to issue, and if not returned in a proper time, the plaintiff to apply that the cause shall go on. The witnesses intended to be examined, and the time, place, and manner of examining them, were named in the order, which directed the commission to be returned by *Michaelmas* term at all events. No trial could be lost, it being a *London* cause.

In *Shovey v. Shebelli*, K. B. 9th May, 1831, an action on a policy of life insurance, a similar rule had been obtained, and three weeks' time limited for taking the examinations, which proving insufficient, the rule was afterwards enlarged.

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Land was settled on the grandfather of lessor of plaintiff for life, remainder to the grandmother in tail. Afterwards, in the lifetime of grandfather and grandmother, the father being issue in tail levied a fine with warranty but without proclamations. The grandmother died, the grandfather died, the father died leaving issue the grandson lessor of plaintiff. Held that the fine with warranty took away the right of entry of the grandson.

DOE dem. CHARLES THOMAS against JONES.

EJECTMENT for eighty acres of land in *Llandister* in *Monmouthshire*. At the trial before *Patteson, J.* at the *Lent* assizes for that county, the lessor of the plaintiff proved his descent as grandson and heir in tail of *Adam Thomas* and *Catherine* his wife, who were formerly seised of the land, by producing their marriage settlement by lease and release dated Oct. 1736, settling the land to the use of *Adam Thomas* for life, remainder to the use of *Catherine Thomas* his wife, for life, remainder to the use of the heirs of the body of *Catherine* by *Adam* to be begotten. *Catherine* died in 1788; her husband, *Adam*, died in 1802, leaving *John Thomas*, his son by *Catherine*, him surviving. *John Thomas* died in 1822, leaving a son *Charles*, the lessor of the plaintiff, whose right of entry as issue in tail was then supposed to accrue. The demise by him was laid in April 1825.

The defendant,—in order to prove an outstanding term of 500 years granted in 1742 by *Adam* and *Catherine* to *Middleton*, by way of mortgage to secure 100*l.* and interest, with a covenant to levy a fine, produced a fine levied by them without proclamations. *Patteson J.* held that to be no evidence of the good creation of a term by *Adam* and *Catherine*, so as to bar the lessor of plaintiff as heir in tail taking the estate tail, though if the fee had come to him he might have been estopped.

The defendant then put in a conveyance by lease and release dated *May* 1784, by *John Thomas*, the father of the lessor of the plaintiff, to *J. Price*, the father of defendant, and under whom she claimed, by way of mortgage for 90*l.* with covenant to levy a fine. Also the chi-rograph of a fine *sur conuzance de droit come ceo* levied in

Easter Term 1785, between *J. Price* plaintiff, and *John Thomas* defendant. The fine had a clause of warranty by *John Thomas*, (a) and was indorsed, that proclamations had been made, but no record of the proclamations was produced. The deed to lead the uses was to the uses of *J. Price*. The lessor of the plaintiff had a verdict. *Maule* obtained a rule to enter a nonsuit on the grounds, 1st, that the fine of 1785, though without proclamations, operated at common law as an estoppel to the conusor, and by discontinuing the estate tail even as to strangers after the estate came to conusor in 1802, barred the right of entry of persons claiming under *John Thomas*; 2. That the clause of warranty in the fine discontinued the estate tail *quoad* the issue in tail.

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Russel Serjt. shewed cause.—The fine was levied by *John Thomas*, when issue in tail, at a time when he had only a possibility of an estate tail. He did not become tenant in tail in remainder, till 1788, and had no right of possession till 1802, when *Adam* died. Then has the fine of 1785 without proclamations, barred *Charles* of his right of entry as issue in tail on the death of the conusor, his father, *John*, in 1822?—*John Thomas* could not in 1785 create a discontinuance of the estate tail, not being at that time seised of the estate tail in possession. *Doe v. Jones*, (b) *Driver v. Hussey*. (c) It may even be contended that a fine levied by a remainder-man in tail when out of possession has no effect. *Smith d. Dormer v. Parkhurst*. (d)

It will be said that the fine levied by *John Thomas* while issue in tail out of possession created a discon-

(a) See West's *Symbolography*, Part. 2. fol. 5. b.

(b) 1 B. & C. 238. and other cases cited id. 243.

(c) 1 H. Bla. 269.

(d) 3 Atk. 135. 140. 6 Brown's P. C. 351. Willes 341. S. C. See 5 Cruise 294, 3d edit.

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tinuance *quoad* the conusor and his issue in tail, barring their right of entry, and estopping them from saying *quod partes finis nil habuerunt*. But the issue in tail now lessor of the plaintiff, would not be so affected unless the fine were levied with proclamations under 4 H. 7. c. 24. and 32 H. 8. c. 36. (a)

The doctrine of estoppel does not apply to the heir in tail, who is only barred under the above statutes. The effect of *Grant's case* as cited by *Warburton, J.* in *Lampet's case*, (b) is that where a fine with proclamations is levied by a tenant in tail before he is entitled in possession, the issue in tail is barred by the statute 32 H. 8. c. 36, by reason of the words in that statute, "before the fine levied in any wise intailed to the person or persons so levying the fine," by *which* an estate tail in *futuro* is comprehended, and all that by force of the said statute, for *partes finis nihil habuerunt*. In the *Touchstone* (c) it is said, if land be given to A. and his heirs male, remainder to B. and his heirs male, remainder to right heirs of A., A. bargains and sells to J. S. and his heirs, and levies a fine *come ceo* to him and his heirs—the remainder to B. is not discontinued by this, but it is a bar to the estate tail *by the statutes*, and causes the bargainee's estate to last as long as the tenant in tail has issues of his body; but if the fine had preceded the bargain and sale, it had been a discontinuance of the remainder, but in neither case a bar to him in remainder. *Littleton*, sect. 601. is an authority that a release by tenant in tail to his disseisor, binding him and his heirs to warranty, which warranty descends to his issue, is a discontinuance by reason of the warranty. Lord Coke assigns as the reason why the war-

(a) See 5 Cruise, 3d edit. 155. tit. xxxv. ch. viii. s. 21. *Hunt v. Bournes*, Salk. 340.

(b) 10 Co. 50. a.

(c) p. 27, 28.

ranty makes the discontinuance to be, that if the issue in tail should enter, the warranty should be destroyed, and therefore to the end *that if assets in fee simple do descend*, he to whom the release is made may plead the same and bar demandant, by which means all rights and privileges are saved. It is not pretended that assets descended in the present case.

The property of *John Thomas* in 1785, did not lie in livery. *Littleton*, sect. 618. is, "And note, that of such things as pass by way of grant, by deed and without livery, there such grant makes no discontinuance, and albeit such things be granted in fee by fine, yet this maketh not a discontinuance." Lord *Coke* adds, the general reason is, that it is a maxim of law that a grant by deed of such things as lie in grant and not in livery, works no discontinuance, but the particular reason is, for that of such things the grant of tenant in tail worketh no wrong either to the issue in tail, or to him in reversion or remainder, for nothing passes but only during the life of the tenant in tail, which is lawful, and *every discontinuance works a wrong* as has been said; and afterwards, if a thing lying in grant be granted by fine it works no discontinuance. *Doe v. Oliver*, (a) does not affect the simple position that there being no discontinuance here there was no estoppel, *Weale v. Lower*. (b) What only operates to estop the interest of the tenant for life works no wrong, and therefore is not a discontinuance.


Maule and Busby in support of the rule.—The marriage settlement of 1736 made *Catherine Thomas* tenant in tail (expectant on the death of *Adam Thomas*) for

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(a) 10 B. & C. 181.

(b) Pollexfen, 54. and post, 518.

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that deed conferred an estate of freehold on her, and limited an immediate estate to the heirs of her body, so that she took the whole estate of inheritance in possession by the rule in *Shelly's case*, (a) and the conusor of the fine had nothing at all at the date of it. At the death of *Catherine Thomas* the conusor, *John Thomas* became tenant in tail in remainder, expectant on his father *Adam Thomas's* death. When that event took place in 1802, *Price*, the purchaser, entered, and the land has since been possessed by him and persons claiming under him. At the death of the conusor, *John Thomas*, in 1823, the title of the lessor of the plaintiff as issue in tail accrued. Had the fine of 1785 been levied with proclamations, he would have been barred, for the conusee would have taken a base fee. (b) Then the question arises, What is the effect of a fine at common law, *i. e.* without proclamations, levied by issue in tail not in possession during the life of the ancestor, being tenant in tail, as against other issue in tail claiming through him? The defendant contends that such a fine enures as before the stat. 4 H. 7. c. 24, by estoppel against the conusor and parties claiming through him. When the conusor's estate came into possession in 1802, that interest fed the estoppel, and bars the right of entry of conusor, and those who claim under him, who cannot set up title in law from his not being in possession. Is the estoppel under the fine altered by the circumstance of the estate tail afterwards coming to the conusor? The fine of a party not having estate in the land may be estoppel against him, and parties claiming through him, but it was contended that the doctrine of estoppel does not apply to issue in tail, and that 4 H. 7. c. 24,

(a) 1 Co. 104. a. see vol. i. 356. 262. note (l. 5.) by *Thomas*, citing *Fearne on Cont. Rem.* 37, 38.

(b) *Harg. & Butl. Co. Litt.* 121. a. note 171.

and 32 H. 8. c. 36, prevented issue in tail from saying *partes finis nihil habuerunt*; but though those statutes do not alter the nature of a fine, or affect the common-law right to levy it, nor do they take away that plea or give it to certain persons except issue in tail, it is to be inferred from them that the plea had existed and been taken away long before. Stat. 27 Ed. 1. c. 1. *de finibus levatis*, in fact took it away. A fine at common law barred not only persons parties and privies thereto, viz. not only such as parties might lawfully bar, but every other person being *compos*, &c. who did not claim within a year and a day. (a) Stat. 32 H. 8. c. 36 comprehends an estate tail *in futuro*, (b) and does not make possession requisite.—[*Bayley*, B. There is no doubt that even a contingent remainder-man can levy a fine of the remainder. *Doe d. Christmas v. Oliver*. (c)]

Fines without proclamations then stand on the statutes before 4 H. 7. Thus in *Trinity* term 4 *Eliz.* it was held that defective proclamations might be reversed, but that the fine should stand in force or make a discontinuance. (d) Stat. 18 Ed. 1. in declaring the effect of a fine at common law, says nothing of parties being in possession. Taking it that such a fine only operates against the conusor and persons claiming under him—what limitations are introduced by statute? The main object of the statute *de donis*, (e) was to prevent tenants in tail having conditional fees from alienating after condition performed, so as to bar their issue or the donor. The form of the writ prescribed by that statute shews there was no remedy by entry. Tenant in tail in the eye of

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(a) St. 18 Ed. 1. *Modus levandi fines, sub. fin.* 2 Inst. 510.

(b) *Grant's case*, cited in *Lampet's case*, 10 Co. 50. a. See *ante*, 508.

(c) 10 B. & C. 181.

(d) See *Dyer* 216. a. pl. 54.

(e) 13 Ed. 1. West. 2. c. 1. 2 Inst. 332.

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the law is considered seised of an estate of inheritance. The condition from which a fee-simple conditional at common law took its appellation, did not suspend the fee from vesting in the donee immediately by the gift. (a) Thus if he aliened before issue born, it not only was no forfeiture, but if he afterwards had issue it was a bar to them. *Plowd.* 239. 2 *Inst.* 333.—but the condition, though it did not prevent the fee from vesting in the donee, suspended his power of alienation. To that power it was considered a condition precedent that the donee should have issue born.

The stat. *de finibus levatis*, (b) passed to increase not the common-law effect of fines, but the effect left them by the stat. *de donis*, before which act parties and privies were barred absolutely. Their operation had been narrowed by parties and privies saying that before and at the time of levying the fine and afterwards, demandants or their ancestors were always seised of the lands contained in the fine or of some parcel thereof; (c) the substance of that averment when traversed being, that the parties to the fine were not seised. In 2 *Inst.* 522, it is said a mere stranger could not aver against a fine, nor could the parties or their heirs. In *Zouch v. Bampffield*, (d) cited in the case of *Fines*, (e) *Anderson* and the other judges agreed that the demandant being heir in tail against such fine levied by his ancestor, whose heir he is, was estopped to aver his seisin and continuance thereof in a stranger at the time of the fine levied, or to aver *quod partes finis nihil habuerunt*; and it seemed the better opinion that before 4 H. 7. c. 24, and 32 H. 8. c. 36, the issue in tail was not admitted to

(a) Harg. & Butt. note 281. Co. Lit. 326. b.

(b) 27 Ed. 1. c. 1. 2 *Inst.* 519.

(c) See 27 Ed. 1. c. 1.

(d) 1 Leon. 75. 83.

(e) 3 Co. 88.; and 90. a.

such averments against a fine levied by his ancestor. (a) The act *de finibus levatis* is compatible with the stat. *de donis*, for issue in tail do not lose the power of avoiding the fine of another under the latter statute. That statute occasioned a different plea from *quod partes finis nihil habuerunt*, viz. that consor had something in the land, and had no power by the stat. *de donis* to alienate it. The plea *quod partes finis*, &c. is taken away as to parties and privies by the statute *de finibus levatis*.

Secondly, The clause of warranty in the fine discontinued the estate tail against the issue of the tenant in tail on whom the estate tail afterwards descended. Warranty may or may not accompany a fine, and is not mentioned in the statutes of fines. The heir was bound at common-law whether assets descended or not. The stat. *Ann.* (b) has taken away collateral warranty which bound the heir, where no assets descended; the warranty descending here is clearly lineal. *Littleton*, §. 715, is, "And note that in every case where a man demands lands in fee tail by writ of formedon if any of the issue in tail that has or has not possession, makes a warranty, &c. if he which sues the formedon might by any possibility, by matter which might be *en fait*, convey to him by him that made the warranty *per formam doni*, this is a lineal warranty and not collateral," which shews warranty might be made by tenant in tail out of possession. Lord *Coke* (c) defines lineal warranty to be a covenant real annexed to the land by him which either was owner or *might have* inherited; thus including the warranty of a person having nothing in it.

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(a) And see Com. Dig. Fine (H. 1.) 3 Co. 88. b. *Thomas's note* (K. 1.)

(b) 4 & 5 An. c. 16. s. 21.

(c) Co. Lit. 370.

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In *Doe d. Christmas v. Oliver*, (a) a fine by a contingent remainder-man levied before his interest became vested, and while he had only a remainder in fee in expectancy, was held good and operated as an estoppel. Though there were proclamations then, yet if the statutes 4 H. 7. c. 24 and 32 H. 8. c. 36, do not enable a man to levy a fine who could not do so at common law, the proclamations alone could not give him the requisite interest. In Lord *Zouch's* case (b) though the fine was with proclamations, the court felt no difficulty in entertaining the position that a tenant in tail out of possession could levy a fine. In *Weale v. Lower*, (c) the estate vested in the ancestor under the rule in *Shelley's* case. The 4th question (p. 56) was, admitting that at the time of a lease granted and fine levied by the son then remainder-man in tail, his remainder was contingent only, and therefore no estate passed by his deed and fine. Yet whether, had he survived so that that remainder should be vested in him, it would not have been against him by estoppel, and so good also against his heirs? The court held (p. 60.) that the lease, which at the beginning was only good against him by estoppel, would then have been turned into a good estate and term in interest.

Whatever estate comes to a party who levies a fine, that fine shall enure to vest in the conusee, and the claim of the issue in tail by, under, or through the ancestor, is barred by the warranty of the conusor.

Cur. adv. vult.

June 13.

LORD LYNDEHURST C. B. now delivered the judgment of the Court. — This cause was tried at the last

(a) 10 B. & C. 181.

(b) As cited 3 Co. 90. a. *Zouch v. Bamfield*, S. C. ante, 513.

(c) *Pollexfen* 54. 66. A. D. 1672. and see 10 B. & C. 183. 190.

assizes for the county of *Monmouth*, and a motion was made on the part of the defendant to set aside the verdict, which was found for the plaintiff, and to enter a nonsuit. The estate had been settled on the grandfather of the lessor of the plaintiff for life, remainder to the grandmother in tail; afterwards, in the lifetime of the grandfather, and during his seisin, the father levied a fine *come ceo* with warranty, but (as we must take it upon the evidence in this case) without proclamations. The question is, whether this fine with the warranty has taken away the right of entry of the son, and we are of opinion that it has. We cautiously abstain from saying that it worked a discontinuance, because, though the entry is taken away as to the issue in tail as effectually as by a discontinuance, it is not taken away as to a remainder-man or reversioner (*a*), which would be the case upon what is properly a discontinuance. *Littleton*, in s. 637, states: "Note, that an estate tail cannot be discontinued but where he that makes the discontinuance was once seised by force of the entail, unless it is by reason of a warranty;" and he puts this case as an instance: — "If there be grandfather, tenant in tail, father and son, and the grandfather is disseised by the father, and the father then makes a feoffment without warranty and dies, and then the grandfather dies, the son may well enter on the feoffee, because this was no discontinuance, inasmuch as the father was not seised by force of the entail at the time of the feoffment, but was seised in fee by the disseisin of the grandfather." And upon the words of *Littleton*, "unless it be by reason of a warranty," Lord Coke has this comment: — "For in many cases, a warranty added to a conveyance is said to make a discontinuance *ab effectu*, although he that

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(a) See *Zouch v. Banfield*, 1 Leas. R. 80. *infra*, p. 518.

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made the conveyance was never seised by force of the estate tail, because it doth take away the entry of him that right hath, as a discontinuance doth." And after noticing that had the father survived the grandfather, the son might nevertheless have entered upon the father's death, he adds — "But if the feoffment had been with warranty, then it had wrought the effect of a discontinuance." In *Littleton*, s. 598, another instance is put of the difference which a warranty occasions by taking away the entry of the issue in tail:—"If tenant in tail be disseised, and release to the disseisor (without warranty), this is no discontinuance, but (s. 601) if he release to the disseisor, and bind himself and his heirs to warranty, and dies, and this warranty descends upon his issue, this is a discontinuance by reason of the warranty." Lord *Coke* gives the reason of this:—"If the issue in tail," he says, "should enter, the warranty, which is so much favoured in law, should be destroyed, and therefore it makes a discontinuance to the end that if assets in fee simple do descend, he to whom the release is made may plead the same and bar the demandant, by which means all rights and advantages are saved. The reason why the warranty in such case would be destroyed, may be collected from *Seymour's case* (a); for that case established this position, that to make a warranty contribute to work the effect of a discontinuance, it must be annexed to some estate, and must continue so annexed; for the instant that estate is determined, the power of enforcing the warranty ceases.

To what estate, then, is the warranty in this case annexed? *John*, the cognizor, had no estate. When he levied the fine, the fine operated in its creation by estoppel only, and though, upon *Adam's* death, the estate

(a) 10 Co. 96. a.

which *John*, the cognizor, took would feed the estoppel, it would, we think, feed it only so long as it rightfully might — that is, during *John*, the cognizor's, life, and no longer. And though, if the lessor of the plaintiff was at liberty to insist upon this point, it might not admit of an answer, yet, if he be by law precluded from so doing, and if, from being privy to *John*, the cognizor, as heir in tail, through him he is prevented from saying that the parties to the fine had nothing in the land at the time the fine was levied, the fine will have the same effect as against him as if the parties to the fine had been seised at the time the fine was levied; and we are of opinion that by law he is so precluded. By 27 Edw. 1. c. 1. *de Finibus levatis*, the parties to a fine and their heirs were prohibited from avoiding a fine, by pleading that before and at the time of the fine, and afterwards, the demandants or their ancestors were always seised; and in the Case of *Fines* (a), the effect of this provision is stated distinctly to have been to take away from the issue in tail the power of averring *quod partes finis nihil habuerunt*. Exception had been there taken that stat. 27 Ed. 1. c. 1. did not extend to heirs in tail, but only to heirs in fee simple; to which it was answered, that although the issue in tail was not barred by any fine levied by his ancestor before 4 H. 7. c. 24., yet he was ousted to aver in such case, *quod partes finis nihil habuerunt*; and being privy and heir to him who levied the fine, was by the statute 27 Ed. 1. c. 1. estopped and concluded to annihilate the fine of his ancestor by such plea; and although it is provided by the statute *de donis* “*Quod finis proprie sit nullus*,” that is to say, to bar the right of the issue in tail, yet it is an estoppel to him to say, *quod partes finis nihil habuerunt*; and Lord Coke refers to 22 Ed. 3. 17, and 33 Ed. 3., *Fitzherbert's Abridgment*, tit. Estoppel, pl. 280,

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where instances of such estoppel occur. In Lord *Zouch* v. *Bamfield* (a), it was said by the justices "that the statute *de donis* doth avoid the fine as to the foreclosing of the issue in tail of his formedon, yet it remaineth in force to restrain the heir in tail from averring a thing against the fine, as well as the heir in fee simple; and in all cases where he against whom a fine is pleaded, claims by him who levied the fine, he shall not have the same averment. If my father, tenant in tail or tenant in fee, grant the land by fine, and afterwards I make title to the same land by the same ancestor, I shall not be received to say that they who were parties to the fine had not any thing at the time of the fine levied." Upon these authorities, we are of opinion that the lessor of the plaintiff, who is clearly privy to *John* the cognizor, and claims as heir in tail by him, is estopped from saying that there was not a proper seisin at the time this fine was levied; and that it must therefore be taken as against him, that the fine created an estate to which the warranty was annexed; and that to protect such warranty, and prevent the lessor of the plaintiff from destroying such estate, and thereby screening any assets he may have by descent from claim under such warranty, the fine in this case had, by reason of the warranty, the effect of a discontinuance; that the entry of the lessor of plaintiff is consequently taken away; and that the rule for a nonsuit ought to be absolute.

Rule absolute.

(a) 1 Leon. 83.

REGULÆ GENERALES.

IN THE

COURT OF EXCHEQUER OF PLEAS.

31st May 1831.

In future it will not be necessary to give a rule to bring in demurrer books, but a motion for a concilium may be made without it, and it will be sufficient to deliver the books to the Barons two days before the day of argument.

TRINITY TERM, 1 W. 4.

Whereas, since the statute of 7 and 8 Geo. 4. c.71. instances have occurred in which, upon proceedings in the Court of Exchequer, by way of subpoena and attachment, defendants have been arrested upon writs of attachment, notwithstanding the same have not issued for a bailable cause of action, and it is desirable that such practice shall be discontinued, IT IS THEREFORE ORDERED, that, from thenceforth, no arrest shall be made upon any such writ of attachment, unless the same shall be for a bailable cause of action, and shall be duly marked and indorsed for bail.

LYNDHURST.
J. BAYLEY.
W. GARROW.
J. VAUGHAN.
W. BOLLAND.

31st May 1831.

REGULÆ GENERALES

OF THE

KING'S BENCH, COMMON PLEAS,

AND

EXCHEQUER.

LAST DAY OF TRINITY TERM, 1 WILLIAM IV. 1831.

Putting in and
justifying bail.

Inquiring after
bail.

Notice of bail—
contents.

IT IS ORDERED, That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. That if the plaintiff is desirous of time to enquire after the bail, and shall give one day's notice thereof, as aforesaid, to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

AND IT IS FURTHER ORDERED, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where

each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

AND IT IS FURTHER ORDERED, That if the notice of bail shall be accompanied by an affidavit of each of the bail according to the form hereto subjoined, (p. 525.) and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification, and if such bail are rejected, the defendants shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

Costs of justifying or opposing bail.

AND IT IS FURTHER ORDERED, That if the plaintiff shall not give one day's notice of exception to the bail, by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

Taking recognizance of bail out of court.

AND IT IS FURTHER ORDERED, That the bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

Changing bail.

AND IT IS FURTHER ORDERED, That with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *Indebitatus Assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. AND to secure the delivery of particulars in all such cases, IT IS FURTHER ORDERED,

Particulars of demand must be delivered with certain declarations and notices of declarations.

Costs where particulars not so delivered.

Annexing particulars of demand and set-off to records when entered with marshal.

that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. AND that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the Judge's marshal.

Defendants, whether prisoners or not, must plead without imparlance to declarations filed, &c. on last day of term.

AND IT IS FURTHER ORDERED, That upon every declaration, delivered or filed, on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlance.

Non-pros.

AND IT IS FURTHER ORDERED, That no judgment of non pros shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney or agent, as the case may be.

Summonses before a judge confined to two.

AND IT IS FURTHER ORDERED, That hereafter it shall not be necessary to issue more than two summonses for attendance before a judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary.

Delivering declaration *de bene esse*.

AND IT IS FURTHER ORDERED, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process in the case of process which is not bailable, or until the expiration of six days from the time of the arrest in case of bailable pro-

cess ; and such six days shall be reckoned inclusive of the day of such service or arrest.

AND IT IS FURTHER ORDERED, That declarations in *ejectment* may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the *essoins* or first general return-day.

Serving declarations in *ejectment* before first day of term.

AND IT IS FURTHER ORDERED, That before taxation of costs, one day's notice shall be given to the opposite party.

Notice of taxation of costs.

AND IT IS FURTHER ORDERED, That no rule to shew cause, or motion shall be required, in order to obtain a rule to plead several matters, or to make several *avowries* or *cognizances* ; but that such rules shall be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, *avowries* or *cognizances*. PROVIDED, That no summons or order shall be necessary in the following cases, that is to say, where the plea of *non-assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, *set-off*, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas shall be pleaded together ; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

Rules for pleading several matters to be drawn upon judges' order.

Cases where no order necessary.

AND IT IS FURTHER ORDERED, That these Rules shall take effect on the first day of next Michaelmas term, except the rule as to the service of declarations in

Commencement of New Rules.

ejectment, which shall take effect from the 25th day of October next.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.

FORM OF AFFIDAVIT [Of Bail. See p. 522.]
IN THE

Between, &c.

A. B., one of the bail for the above-named defendant, maketh oath, and saith, that he is a housekeeper, [or *freeholder as the case may be*] residing at [*describing particularly the street or place, and number, if any,*] that he is possessed of property to the amount of £. — [*the amount required by the practice of the courts,*] over and above all his just debts; [*if bail in any other action add "and every other sum for which he is now bail;"*] that he is not bail for any defendant except in this action, [*or if bail in any other action or actions add "except for C. D. at the suit of E. F. in the court of —, in the sum of £—; for G. H., at the suit of I. K. in the court of —, in the sum of £—"; specifying the several actions with the courts in which they are brought, and the sums in which the deponent is bail,*] that the deponent's property, to the amount of the said sum of £—, [*and if bail in any other action or actions "of all other sums for which he is now bail as aforesaid,"*] consists of [*here specify the nature and value of the property, in respect of which the bail proposes to justify as follows;— stock in trade, in his business of —, carried on by him at —, of the value of £—; of good book debts owing to him to the amount of £—; of furniture in his house, at —, of the value of £—; of a freehold or leasehold farm, of the value of £—. situate at —, occupied by —; or of a dwelling-house of the value of £—, situate at —, occupied by —, or of other property, particularizing each description of property, with the value thereof;*] and that the deponent hath for the last six months resided at — [*describing the place or places of such residence.*]

Sworn, &c.

REGULA GENERALIS.

TRINITY TERM, 1 WILLIAM IV. 1831.

WHEREAS declarations in actions upon bills of exchange, promissory notes, and the counts, usually called the common counts, occasion unnecessary expence to parties by reason of their length, and the same may be drawn in a more concise form; Now for the prevention of such expense, It is ORDERED, That if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions, annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in *debt* to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant, shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. AND IT IS FURTHER ORDERED, That on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN.
N. C. TINDAL.
LYNDHURST.
J. BAYLEY.
J. A. PARK.
J. LITLEDALE.
S. GASELEE.

J. VAUGHAN.
J. PARKE.
W. BOLLAND.
J. B. BOSANQUET.
W. E. TAUNTON.
E. H. ALDERSON.
J. PATTESON.

SCHEDULE OF FORMS AND DIRECTIONS.

Count on a promissory note against the maker, by payee or indorsee, as the case may be.

For that whereas the defendant, on the — day of —, in the year of our Lord —, at London [*or, in the county of —*] made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £. —, — days [weeks, or months] after the date thereof, [*or as the fact may be,*] which period has now elapsed; [*or, if the note be payable to A. B.*] and then and there delivered the same to *A. B.*, and thereby promised to pay to the said *A. B.* or order £. —, — days [weeks, or months] after the date thereof, [*or as the fact may be,*] which period has now elapsed; and the said *A. B.* then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Count on a promissory note against payee by indorsee.

Whereas one *C. D.* on the — day of — in the year of our Lord — at London [*or in the county of —*] made his promissory note in writing, and thereby promised to pay the defendant or order £. —, — days [weeks, or months] after the date thereof, [*or as the fact may be*] which period has now elapsed; and the defendant then and there indorsed the same to the plaintiff, [*or and the defendant then and there indorsed the same to X. Y. and the said X. Y. then and there indorsed the same to the plaintiff;*] and the said *C. D.* did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

Count on a promissory note against indorser by indorsee.

Whereas one *C. D.* on — at London, [*or in the county of —,*] made his promissory note in writing and thereby promised to pay to *X. Y.* or order £. —, — days [weeks, or months] after the date thereof, [*or as the fact may be,*] which period has now elapsed; and then and there delivered he said note to the said *X. Y.*, and the said *X. Y.* then and there indorsed the same to the defendant, and the defendant then and there indorsed the same to the plaintiff; [*or, and the defendant then and there indorsed the same to Q. R. and*

the said Q. R. then and there indorsed the same to the plaintiff;] and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

Whereas the plaintiff on —, at London [or in the county of —.] made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £. —, — days [weeks, or months] after the date [or sight] thereof, which period has now elapsed; and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same, according to the tenor and effect thereof and of his said acceptance thereof, but did not pay the same when due.

Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

Whereas the plaintiff on —, at London [or in the county of —.] made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to O. P. or order £. —, — days [weeks or months] after the date [or sight] thereof which period has now elapsed, and then and there delivered the same to the said O. P. and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof; yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff; of all which the defendant then and there had notice.

Count on an inland bill of exchange against the acceptor by indorsee.

Whereas one E. F. on —, at London, [or in the county of —.] made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. [or to H. G.] or order £ —, — days [weeks, or months] after date [or sight] thereof, which period is now elapsed, and the defendant then and there accepted the said bill, and the said E. F. [or the said H. G.] then and there indorsed the same to the plaintiff; [or, and the said E. F. or, the said H. G. then and there indorsed the same to K. J. and the said K. J. then and there indorsed the same to the plaintiff;] of all which the defendant then and

there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Count on an inland bill of exchange against the acceptor by the payee.

Whereas one *E. F.* on —, at London, [or in the county of —,] made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £. —, — days [weeks, or months] after the date [or sight] thereof, which period has now elapsed and the defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof.

Count on an inland bill of exchange against the drawer by payee on non-acceptance.

Whereas the defendant on —, at London [or in the county of —,] made his bill of exchange in writing, and directed the same to *J. K.* and thereby required the said *J. K.* to pay to the plaintiff £. —, — days [weeks, or months] after the date [or sight] thereof, and then and there delivered the same to the said plaintiff, and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against drawer by indorsee on non-acceptance.

Whereas the defendant on —, at London, [or in the county of —,] made his bill of exchange in writing, and directed the same to *J. K.* and thereby required the said *J. K.* to pay to the order of the said defendant £. —, — days [weeks, or months] after the sight [or date] thereof and the said defendant then and there indorsed the same to the plaintiff; [or, and the said defendant then and there indorsed the same to *L. M.* and the said *L. M.* then and there indorsed the same to the plaintiff] and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against indorser by indorsee on non-acceptance.

And whereas one *N. O.* on —, at London [or in the county

of—] made his bill of exchange in writing, and directed the same to *P. Q.* and thereby required the said *P. Q.* to pay to his order £.—, — days [weeks, or months] after the date [or sight] thereof, and the said *N. O.* then and there indorsed the said bill to the defendant, [or to *R. S.* and the said *R. S.* then and there indorsed the same to the defendant,] and the defendant then and there indorsed the same to the plaintiff, and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against payee by indorsee on non-acceptance.

Whereas one *N. O.* on —, at London [or in the county of —,] made his bill of exchange in writing, and directed the same to *P. Q.* and thereby required the said *P. Q.* to pay to the defendant or order £.—, — days [weeks, or months] after the date [or sight] thereof, and then and there delivered the same to the defendant, and the defendant then and there indorsed the said bill to the plaintiff, [or to *R. S.* and the said *R. S.* then and there indorsed the same to the plaintiff,] and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Direction for declaration on bills where actions brought after time of payment expired.

1st, *On bills payable after date.*—If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz.: *which period has now elapsed*, and, instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

2d, *On Bills payable after sight.*—And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words denoting the time appointed for payment, the following words, viz.: *and the said drawee [naming him] then and there saw and accepted the same, and the said period has now elapsed*, and in-

REGULA GENERALIS.

stead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

Directions for Declarations on Bills or Notes payable at sight.

If a *Note or Bill* be payable *at sight*, the form of the declaration must be varied so as to suit the case, which may be easily done.

On Foreign Bills.

Declaration on foreign bills may be drawn according to the principle of these forms, with the necessary variations.

Common Counts.

Whereas the defendant on —, at London, [*or in the county of —,*] was indebted to the plaintiff in £. —, for the price and value of goods then and there bargained [*or sold*] and sold [*or delivered*] by the plaintiff to the defendant, at his request :

* And in £. —, for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant, at his request :

And in £. —, for money then and there lent by the plaintiff to the defendant at his request :

And in £. —, for money then and there paid by the plaintiff for the use of the defendant, at his request :

And in £. —, for money then and there received by the defendant for the use of the plaintiff :

And in £. —, for money found to be due from the defendant to the plaintiff, on an account then and there stated between them.

General Conclusion.

And whereas the defendant afterwards, on, &c. in consideration of the premises respectively, then and there promised to pay the said several monies respectively to the plaintiff, on request : Yet he hath disregarded his promises, and hath not paid any of the said monies or any part thereof; to the plaintiff's damage of £. —, and thereupon he brings suit, &c.

Direction as to the General Conclusion.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said *last-mentioned several monies respectively.*

1831.

HARRISON *against* ———.

May 31.

R. V. RICHARDS moved for an attachment against the sheriff of *Middlesex*, for not bringing in the body; but it appearing that the sheriff had entered an appearance, though after the body-rule had expired, (a)

Attachment against sheriff for not bringing in body.

BAYLEY B. refused the rule.

CROSS *against* WILLIAMS.

June 6.

*M*ANNING had resisted the justification of a bail by affidavit, on a cross-affidavit by the plaintiff's attorney, that he was holder of a promissory note of which the proposed bail was maker, and which, though over-due, he had neglected to pay. The time for justifying having been enlarged,

A bail by affidavit rejected, on affidavit that he had dishonoured a note over-due; no reason being stated on his behalf for so doing.

Wyborn shewed cause, but—

Per Curiam.—As it was the duty of the proposed bail to pay the promissory note, he cannot be permitted to justify unless he can state a satisfactory reason for dishonouring it, which he has not done.

Bail rejected. (b)

(a) *Quære*, should not the sheriff have put in bail? Tidd, 311.

(b) See Tidd, 9th edit. 274. & 284.

1831.

ROBERTS *against* WRIGHT.

June 8.

The venue may be changed in an action on a written agreement not under seal, where the plaintiff does not undertake to give material evidence in the first county.

ASSUMPSIT on a written agreement, that on completion of work stipulated for, the contract was to be considered an I. O. U. for 100*l.* to be immediately paid by defendant.

J. Jervis moved to discharge a rule to change the venue from *Carnarvonshire* to *Denbighshire*, obtained on the usual affidavit. From the distance at which the plaintiff's attorney resided, the rule had become absolute before cause could be shewn against it. (a) The Court ordered notice of this motion to be given to the defendant, and on the 11th of *June*, *J. Jervis* shewed for cause against the original rule, that the action was substantially brought on an I. O. U., which, though it does not require a stamp, has every other quality of a bill; nor will the venue in general be changed in an action on a written agreement, e. g. a charter-party, *Morris v. Hurry* (b). That fact appears from the declaration, so that *Picard v. Featherstone* (c) does not apply.

Henderson, in support of the original rule.—There is no count on an I. O. U., and as by the agreement the money is only payable on a contingency, it is not a bill so as to require special ground to be shewn for changing the venue. As a simple contract, and *nullius loci*, it is unaffected by the rule of not changing the venue in actions on specialties, which proceeds on their attribute of locality by being *bona notabilia* where they happen to be.

Lord LYNTHURST C. B.—For the purpose of supporting this rule, it is sufficient to shew that the decisions

(a) See *ante*, 286. note (a). (b) 7 Taunt. 306. (c) 4 Bing. 39.

against changing the venue do not include every action on a written instrument not under seal.

BAYLEY B.—The Court will not refuse to change the venue on every written instrument not under seal, though it will not be changed in an action on a promissory note or bill of exchange, unless special ground be shewn on affidavit. (*a*). Here the plaintiff does not undertake to give material evidence in *Carnarvonshire*, so as to be entitled to retain or bring back the venue. (*b*)

Rule absolute to change the venue. (*c*)

(*a*) Anon. 2 Chitt. B. 418.

(*b*) See *Emery v. Emery*, 6 Pri. 336. So in K. B. *Price, Bt. v. Woodburn*, 6 East, 233. *Bowden v. Glasston*, 5 Pri. 359. turns on the distance of the witnesses' residence from the place of trial under the first venue.

(*c*) In *Mercer v. Waters*, 2d May, 1831, the Exchequer held that a rule to change the venue could not be drawn up till the cause of action was disclosed, so as to see if it was a proper case for changing the venue. *Clarkson* moved. In K. B. the rule is drawn up on reading the affidavit and the declaration in the cause.

LLOYD v. DAVIS.

TRESPASS against a constable, for assaulting the plaintiff.

R. V. Richards moved to stay proceedings till the plaintiff should give security for costs, or disclose his place of residence. The affidavit stated, that notwithstanding many inquiries, the plaintiff's residence could not be discovered to be in this kingdom; that he had left *Pool* in distressed circumstances, and had been searched for under a charge of bastardy.

A plaintiff will not be required to give security for costs, or disclose his place of residence, where there is no doubt whether he sues in his own right, and it does not appear that he is out of the kingdom.

1831.

ROBERTS
v.
WRIGHT.

1831.

LLOYD
v.
DAVIS.

Per Curiam.—Where there was a doubt whether a plaintiff sued in his own right, a similar application may have been made with success. In one case of trespass and assault, (a), upon affidavit that the identifying the person of the plaintiff was very necessary for the defence, the assault charged having taken place at a meeting of several thousand persons, a rule was granted, to disclose to the defendants the place of residence and occupation of the plaintiff. In *qui tam* actions, a like rule has been granted; but here the plaintiff being under a charge of bastardy, may have been desirous to conceal himself without leaving the kingdom.

Rule refused.

(a) *Johnson v. Birley and others*, 5 B. & A. 540.

END OF TRINITY TERM.

[The following case was inadvertently omitted in the Reports of *Easter Term*.]

MASON against CLARKE.

May 5.

Where a cause is tried during the term, a new trial may be moved for within four days after the *distringas* is returnable.

THIS case had been tried at a previous sittings in the term (*Easter*), before Mr. Baron *Bayley*.

Thesiger now moved for a new trial. More than four days have elapsed since the trial, but not since the return of the *distringas*; and *Kirkham v. Marter* (a) shews that this motion may be made as late as the fourth day after, and excluding that on which the *distringas* is returnable.

The Court assented.

(a) 2 B. & A. 613.

AN

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BAIL BOND.

Time being given till the 27th January to justify bail, on the 25th the plaintiff ruled the sheriff to bring in the body in six days. On the 27th the plaintiff took an assignment of the bail-bond; on the 30th the bail justified. Proceedings on the bail-bond were staid without ordering it to stand as a security; for the time of perfecting bail was enlarged by the body rule, and the plaintiff might have gone on to trial in the original action. *Ladd v. Wilson and others*, M. 1830. (See subsequent Reg. Gen. pa. 163.) 18

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Where in assumpsit by assignees of a bankrupt, the general issue was pleaded, and the defendant had given notice to dispute the petitioning creditor's debt, the depositions before the commissioners were held conclusive evidence of it, under 6 Geo. 4. c. 16. s. 92. though defendant offered to prove its fraudulent origin, and the time allowed for a bankrupt to dispute the commission had elapsed. *Young and others, Assignees of Ireland, a bankrupt, v. Timmins and Another*, M. 1830. 15

If a sufficient petitioning creditor's debt, e. g. on two bills of exchange for 50l. and 70l. be legally proved at a meeting of commissioners of bankrupt, who thereupon declare the acceptor a bankrupt, the subsequent loss of either bill affords no ground to impugn the commission in an action by the assignee against a debtor to the estate. *Pooley, Assignee of Syer v. Millard*, E. 1831. 331

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BILLS AND NOTES.

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A promissory note given by the bankrupt for damages arising by his working for others contrary to an agreement in restraint of trade, is void for want of consideration. *Young and another, Assignees of Ireland v. Timmins and another*, H. 1831. 226

The notice of non-payment of a bill by the acceptor, given by the holder to the drawer or indorser, should, either expressly or by necessary implication, inform him that it has been dishonoured, and that the holder looks to him for payment. *Solarte and others, Assignees of Alzedo a bankrupt, v. Palmer and another (in Error)*, E. 1831. 371

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A bylaw of a corporation imposed a penalty on persons exercising trades in a town, not being free, with a power of distress in case of non-payment. Held, that though the by-law did not require a demand and refusal of the penalty before made, such demand and refusal must be stated in pleading, and distinctly proved by the defendant at the trial, in order to sustain a plea justifying the taking goods for a penalty incurred un-

der such by-law. *Davies v. Morgan and others*, T. 1831.† 457

Held also, that such demand and refusal were not proved by the recital thereof in the warrant of distress put in by the plaintiff to connect the defendants with the acts of trespass. S. C.

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A distringas will not be granted without personal service of the *venire* pursuant to 7 & 8 Geo. 4. c. 71. s. 5. unless on facts which almost irresistibly shew that defendant kept out of the way to avoid that service. *Pitt v. Eldred*, M. 1830. 128

In order to obtain a distringas without personal service of a *venire*, a full and distinct affidavit is necessary to satisfy the court that the defendant keeps out of the way to avoid personal service. (See 7 & 8 Geo. 4. c. 71. s. 5. 289. n.) *Winstanley v. Edge*, H. 1831. 276

A distringas will not be granted without personal service of the *venire*, pursuant to 7 & 8 Geo. 4. c. 71. s. 5. unless on facts from which it may reasonably appear to the satisfaction of the court that the defendant kept out of the way to avoid that service. *Godkin v. Redgate*, E. 1831. 287

Requisites of affidavits in order to found a *distringas*. *Whitehorne v. Simons*, H. 1831. 293

See also *Dobell v. King*, and *Anonymous Case*, T. 1831. 498, 499

Partners in trade, resident at *Hamburg*, had a warehouse in *Manchester*. Service of *venire*, by leaving it with their servant at the warehouse, was held not sufficient to ground a *distringas* to levy issues in order to compel their appearance; and a *distringas* which had issued was set aside with costs. *Hall v. Gumble*, T. 1831. 490

The court will not increase the issues on a *distringas* sued out without complying with the stat. 7 & 8 Geo. 4. c. 71. s. 5. *Pennell v. Kingston*, T. 1831. 495

Semble, a *distringas* should not issue till the 8th day after that on which the *venire* is made returnable. *Thomas v. Elder*, T. 1831. 496

DOCUMENTARY EVIDENCE.

See TITHES.

DOMICIL.

See STOCK.

EJECTMENT.

If a declaration in ejectment is duly served before the *essoiu* day, the omission in the notice of the term in which the tenant is to appear is immaterial. *Doe v. Roe*, H. 1831. 280
See now *Reg. Gen.* pa. 524.

A declaration in ejectment was served on two tenants in possession of different parts of the premises sought to be recovered. A third party entered into a rule to defend alone, as landlord. *Semble*, neither tenant in possession can be admitted to prove adverse possession by the other of the part held by him, for the judgment in ejectment would be evidence against both in an action for mesne profits. *Doe d. Lewis v. Presce*, E. 1831. 410

Service of declaration in ejectment since 11 G. 4. and 1 W. 4. c. 70. §. 6. when the first day in full term falls on *Sunday*. Service of rule for judgment on tenant in possession, after an irregular service of a declaration in ejectment on the *essoiu* day. *Doe v. Roe*, T. 1831. 499

ENTRY.

See BILL OF SIGHT.

EVIDENCE.

Semble, a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, sent by him immediately to the sheriff's office, and there filed in the course of business, is not evidence of the place of arrest, after the officer's death, in an action between third persons. *Chambers v. Bernasconi and others*, T. 1831. 335

Semble, that an entry in a book of a company not incorporate, and purporting to be dated 1672, and to be a promise by one *F. S.* to pay a fine incurred by him for selling in a town not being free thereof, is not evidence, without extrinsic proof who *F. S.* was, and in what situation he stood respecting the corporation. *Davies v. Morgan and others*, T. 1831. 457

Semble, that the declarations of deceased corporators are evidence by reputation of a custom to exclude strangers from trading in a particular town. S.C.

EXECUTORS.

See STOCK.

A testator having contracted to build a wooden gallery, died before any of the work was done. His executors completed it after his death. Held that they were entitled to sue for work, labour, and materials, found by them as executors; for the sum to be recovered would be assets. *Marshall and others, Executors of Salford, v. Broadhurst*, E, 1831.

348

EXTENT.

An extent lies against the insolvent agent of a Fire Insurance Company, where it is found on inquisition that he has received a sum due to the crown for insurance duties, though the company be also liable to the crown. *Rex v. Wrangham*, E. 1831.

383

FINE OF LANDS.

Land was settled on the grandfather of lessor of plaintiff for life, remainder to the grandmother in tail. Afterwards, in the lifetime of grandfather and grandmother, the father being issue in tail levied a fine with warranty but without proclamations. The grandmother died, the grandfather died, the father died leaving issue the grandson lessor of plaintiff. Held that the fine with warranty took away the right of entry of the grandson. *Doe d. Thomas v. Jones*, T. 1831.

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FIRE INSURANCE COMPANY.

See EXTENT.

FLOGGING.

See SEAMEN.

FRAUD.

A fraudulent misrepresentation of the legal effects of a deed by which a party is induced to execute cannot be given in evidence on the plea of *non est factum*. *Edwards v. Brown and others*, H. 1831.

182

FRAUDS, (STATUTE OF.)

See GUARANTEE.

A verbal agreement to take ready-furnished lodgings "for two or three years," is a contract for an interest in land, and valid as a lease for not exceeding three years, but will not support an action for not entering on or occupying the demised premises. *Edge v. Stafford*, E. 1831.

293

Attorneys undertaking. See ATTORNEY.

FREIGHT.

See SHIPS.

FUNDS.

See STOCK.

GUARANTEE.

A guarantee for payment of the debt and costs in an action pending against a third person, unless paid by a certain day, was in writing, but did not stipulate for forbearance of the action. Another action having been brought on the guarantee, the declaration alleged a stay of further proceedings as the consideration for the promise. Held that no such consideration appeared or could necessarily be implied from the written instrument, so as to satisfy the statute of frauds (29 Car. 2. c. 3. s. 4) *Cole, Gent. v. Dyer*, E. 1831.

304

HABEAS CORPUS.

Removal of prisoner for contempt to take his trial for perjury in another county. *Re Thomas Wetton*, E. 1831.

386

HEIR AND ANCESTOR.

In debt against an heir on the bond of an ancestor, *riens per descent* before, at, or since the exhibiting the bill, was pleaded. Plaintiff replied, that before the commencement of the suit defendant had lands by descent. The plaintiff had a verdict, but the jury did not inquire of the value of the lands descended. Held, that the replication provided by stat. 3 W. & M. c. 14. s. 6. having been adopted, the jury who tried the cause should have inquired the value of the lands descended; and a *venire de novo* was awarded. *Brown v. Skuher and others*, T. 1831. 400

Quare, whether 3 W. & M. c. 14. s. 6. is general in its operation, or confined to cases of alienation before action brought; or whether that statute continues to a plaintiff his common-law right to a general judgment on false plea of *riens per descent* pleaded? S. C.

IMPORT AND EXPORT.

See BILL OF SIGHT.

Stat. 6 Geo. 4. c. 107. provides by section 52. that certain spirits and tobacco shall be absolutely prohibited to be imported, unless, if spirits, in casks of not less than forty-six gallons, or in cases of not less than three dozen quart bottles, and if tobacco, and from the *East Indies*, in hogsheads, &c. of 100 lbs. and from other places, in hogsheads, &c. of 450 lbs. each; and by sec. 128, that all such goods whose importation is thus restricted on account of its package, shall be deemed prohibited goods. A count stating that defendant imported spirits and tobacco in casks and cases of less than the legal size, and harboured and concealed the same knowing no duties had been paid or received thereon, is bad, for prohibition of such import is absolute. *The Att. Gen. v. Key*, M. 1830. 52

INFANT.

Attachment for non-payment of costs by *prochein amy*. *Evans, an In-*

fant, suing by Prochein Amy against Davis, E. 1831. 346

INFORMATION.

See PLEADING.

INSOLVENCY.

See JUDGMENT AS IN CASE OF NON-SUIT.

INSURANCE.

Insurance on goods in ship *Java Packet*, at and from *Sincapore, Penang, Malacca, Batavia*, all or any, to the ship's port of discharge in *Europe*, with leave to touch, stay, and trade at all or any ports and places whatsoever and wheresoever in the *East Indies* or elsewhere, beginning the adventure on the goods from the loading thereof on board *as above*; with leave also, *in that voyage*, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly *Sincapore, Penang, Malacca, Batavia, Cape of Good Hope*, and *St. Helena*.—The ship having taken coffee on board at *Batavia*, proceeded to *Sourabaya*, a port in *Java*, 400 miles E. of *Batavia*, and out of the course from *Batavia, Sincapore, Penang*, or *Malacca*, to *Europe*, and took more coffee on board there. She then returned to *Batavia*, and having sailed from thence for *Europe*, was lost.—Held, 1. That the voyage was a voyage within the policy: 2. that the trip to *Sourabaya* was no deviation: and 3. that the coffee shipped at *Sourabaya* was covered by the policy, as well as that shipped at *Batavia*. *Leathley v. Hunter and others*, (in Error), E. 1831. 356

INUENDO.

See SLANDER.

JUDGMENT AS IN CASE OF NONSUIT.

Where a plaintiff, who knew the insolvency of a defendant, declared, on being ruled to do so, in order to avoid the costs of a non-pros, and after-

wards discharged a rule for judgment as in case of a nonsuit, on a peremptory undertaking to try, the court refused to discharge that undertaking. *Cunningham v. Rees*, M. 1830. 1

A rule for judgment as in case of a nonsuit, will not be made absolute while any thing remains due under an agreement between the parties, to pay by instalments. *Anonymous*, E. 1831. 378

After a rule for judgment as in case of nonsuit has been discharged, without imposing terms as to costs, a rule will be granted for the costs of not proceeding to trial. *Hockin* (printed *Dockett*) v. *Reed*, E. 1831. 386

In a country cause, issue being joined in *Hilary* term, if plaintiff does not give notice of trial at the assizes after that term, the defendant cannot in *Trinity* term move for judgment as in case of a nonsuit. *Simons v. Folkingham*, T. 1831. 501

JUSTICES OF PEACE.

In an action against a magistrate, for an act done in the execution of his office, the notice stated the nature of the writ intended to be sued out, and also the cause of action. A writ was sued out and served, but afterwards discontinued; and within the time allowed by the statute, another writ *ejusdem generis* was sued out and served, in which another person was joined as defendant. The court, after verdict, held that the notice was sufficient. *Jones, Gent. one, &c. v. Simpson, Esq. and Darbshire*, M. 1830. 32

LEGACY DUTY.

See STOCK.

Rule for attachment against an executor, for not delivering an account at Legacy-duty Office, is *nisi* only. *Re Estate of Vyvyan*, E. 1 W. 4. 379

LIEN.

See ATTORNEY.

LOADING PORT.

See INSURANCE, 1.

LOSING A TRIAL.

A trial is not lost, unless judgment of the term is lost by the defendant's delay to put in and perfect bail in due time. Accordingly, proceedings on a bail-bond were stayed, after bail put in and justified on the usual terms, without the bail-bond standing as a security, where the writ being returnable the last day of one term, the trial might have been at the first sittings in the next, had bail been put in in due time. *Bevan v. Knight*, T. 1831. 420

MACHINERY.

See DISTRESS.

MASTER AND SERVANT.

A master is answerable for the illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit. Thus, where, after the detection of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit, by which he intended to protect the goods from seizure, the master was held liable for the penalty attached to the offence of unduly using a permit. *Atty. Gen. v. Seddon and Binns*, M. 1830. 41

MODUS.

See TITHES.

MONEY COUNTS AND ACCOUNT STATED.

The words "value received with interest," occurring in an instrument which is not negotiable as a promissory note or bill of exchange, do not of themselves import a money consideration, so as to satisfy an averment that money was lent by plaintiffs to defendant. *Morgan and another v. Stephen Jones*, M. 1830. 21
An instrument by which money was made payable on a contingency, cannot be given in evidence as a promissory note on the counts for money lent, or on the account stated, though sued on between the original parties, and expressing value to have been received. S.C.

A. (Wharton), B. (Thompson), and C. (Craven), being separate traders, agreed to a joint speculation in importing corn. The agent for buying the corn abroad knew that the speculation was on the joint account of *A., B., and C.*, and was directed to consign to *A.*, drawing on him at two or three months. Corn was bought, and bills for the value drawn on and accepted by *A.*, payable at a banker's in London, the correspondents of the plaintiffs, who were bankers at Hull. *A.* had a banking account with the latter, who, being in the habit of paying his acceptances at the house of their London correspondents, paid the above among other acceptances, not then knowing of the joint speculation of *A., B., and C.* *A.*, by way of part security to the plaintiffs, indorsed to them two accommodation bills drawn by himself on *B.* These were unpaid, and *A. and B.* became bankrupts. *C.* had contributed his third of the purchase, but did not appear to have known from what source *A.* obtained his funds for that purpose. Held, that the Hull bankers could not recover against *C.* as for money lent or had and received, the amount of the bills drawn by *A.* on *B.*, though they had given *A.* credit for them in his account, as partly liquidating their advances to pay for the corn bought for *A., B., and C.*, at their joint profit or loss. *Smith and others v. Craven and another*, T. 1831. 389

MORTGAGE.

Where mortgagor and mortgagee join in a lease, containing an express covenant by mortgagor only, for quiet enjoyment, no covenant by both for quiet enjoyment can be implied. *Smith v. A. Pocklington and A. S. Pocklington*, E. 1831. 309

NEW TRIAL.

Costs of new trial, where the event is different from that of the first, should be made part of the rule for a new trial. *Poole, Assignee of Syer, v. Millard*, H. 1831. 260

Semble, where a sufficient reason for a verdict exists in a material defect of proof by the failing party, the

court will not grant a new trial, though the verdict is against the other evidence in the cause, and the deficiency was not discovered at the trial. *Davies v. Morgan and others*, T. 1831. 457

Where a cause is tried during the term, a new trial may be moved for within four days after return of the *distringas*. *Mason v. Clarke*, E. 1831. 534

NON EST FACTUM.

A fraudulent misrepresentation of the legal effect of a deed, by which a party is induced to execute, cannot be given in evidence on the plea of *non est factum*. A mortgagor, with two securities, entered into a bond to the mortgagee, the condition of which, after reciting that the mortgagor was seised in tail of premises of which he had covenanted to suffer a recovery, to enure to the use of the mortgagor in fee, subject to the proviso for redemption, was, that the bond should be void if the recovery should be suffered, so and in such manner as that, under and by virtue thereof, and of the mortgage deed, the premises should be vested in plaintiff in fee, "according to the true intent and meaning" of the mortgage deed, subject only to the proviso for redemption. The recitals in the mortgage deed stated a seisin in fee by mortgagor's maternal grandfather, in 1795. A deed of settlement and fine in 1795, by his daughter and devisee, and her husband, to themselves for their lives, with power of appointment by the former, which she in 1809 executed by a devise to her son, the mortgagor, for life, and his sons in tail; and also a conveyance after the wife's death, of the husband's life estate to the mortgagor were proved.

In an action on the bond against a surety, Held, First, that these recitals were sufficient evidence that the maternal grandfather of mortgagor had seisin, and the possession had followed the limitations and power of the deed of 1795; also, that the meaning of the conditions was, that such a recovery should be suffered, as would vest an absolute

estate in fee in the mortgagor. *Edwards v. J. H. Brown, Stephens, and Harries*, H. 1831. 182

NOTICE OF ACTION.

See JUSTICES OF PEACE.

NOTICE OF TRIAL.

See JUDGMENT AS IN CASE OF NONSUIT.

OFFICER OF COURT OF EX-CHEQUER.

See PRIVILEGE.

OUTLAWRY.

See SEQUESTRATION.

PAPER BOOKS.

See DEMURRER.

PARTNERS.

When a partnership name is pledged by a bill drawn in the name of the firm, the partnership, of whomsoever consisting, and whether the partners are known or secret, or are named in the firm or not, will be bound, unless the title of the party seeking to charge them can be impeached. *Wintle and another v. Crowther and Coombs*, H. 1831. 210

PEREMPTORY UNDERTAKING.

See JUDGMENT AS IN CASE OF NONSUIT.

PERSONALTY.

See STOCKS.

PLEADING.

An information by the attorney-general, on 6 Geo. 4. c. 108. s. 35. stated a bribe to have been offered by defendant to Thomas Dabbs, a custom-house officer. His name was proved to be Thomas Tyrrel Dabbs. Held no variance, as it could not have been pleaded in abatement. *Attorney General v. Hawkes*, M. 1830. 3

An averment that *bugles* had been landed without due entry, was held to be supported by proof that these

articles, though they might also be called *beads*, were always called *bugles* at the custom-house, were entered and exported as such, paid a higher import duty than *beads*, and were spoken of by defendant as *bugles*. *Attorney General v. Hawkes*, M. 1830. 9

PLEADING.

A defendant may plead in person to an information by the crown. *Attorney General v. Carpenter*, E. 1831.—351
See SLANDER.

PORT.

See INSURANCE, 1.

PRIVILEGE.

One of the original officers of the Exchequer may sue, jointly with an unprivileged person, by *capias* of privilege, without losing such privilege, and is therefore entitled to costs on recovering less than 5*l.* against an attorney of K. B. resident in *London*, notwithstanding sect. 10 of the *London Court of Requests Act*, 39 Geo. 3. c. civ. *Elkins, a Side Clerk in the office of Clerk of the Pleas, and Elkins, Gent. &c. v. Harding, Gent.* H. 1831. 274

PROBATE DUTY.

See STOCK, 2.

PROCHEIN AMY.

See INFANT.

PROMISSORY NOTE.

See MONEY COUNTS.

PROPERTY, RIGHT OF.

See TROVER.

RECITALS.

In deed. See NON EST FACTUM.
In warrant of distress. See BY-LAW.

RECOGNIZANCE.

See SCIRE FACIAS.

REGULÆ GENERALES, 154, 291.
519

RESTRAINT OF TRADE.See **TRADE.****RIENS PER DESCENT.**See **HEIR AND ANCESTOR.****SCIRE FACIAS.**

In scire facias against the consuror of a recognizance to the crown, no costs are recoverable by the defendant, though he succeed on demurrer and in error. *The King in aid of Hollis v. Bingham*, M. 1831. 262

SEAMEN.

A., a seaman on board an Indiaman at anchor in *Macao* river in *China*, within two or three miles from *Macao*, and near several other Indiamen, was guilty of disobedience to the gunner, in the captain's absence. Three days after the captain came on board, and ordered *A.* to be flogged. The plaintiff, another seaman, disobeyed these orders, and resisted their execution in a mutinous and disorderly manner, for which he was himself flogged, by the like orders. Held, that there was no legal necessity to inflict *A.*'s punishment immediately after his offence; and that therefore the captain was justified in moderately flogging the plaintiff for mutinous disobedience to his lawful order to flog *A.* Also, that a captain's power to inflict moderate corporal punishment exists on board a ship, not only while at sea, but when in a foreign river or port, near the land, and within reach of assistance from other ships of the same nation. *Lamb v. Burnett*, H. 1831. 265

SEISIN, EVIDENCE OF.See **NON EST FACTUM.****SEIZURE.**See **BILL OF SIGHT.****SECURITY FOR COSTS.**

A plaintiff will not be required to give security for costs, or to disclose his place of residence, where there is no doubt that he sues in his own

right, and it does not appear that he is out of the kingdom. *Lloyd v. Davis*, T. 1831. 533

SEQUESTRATION.

Practice—Requisites for issuing sequestration on outlawry of beneficed clerk. *In re outlawry of Nathaniel Hinde, Clerk*. E. 1831. 347

SHERIFF.

Practice of discharging an attachment against a sheriff for not bringing in the body. *Crosby v. Davis*, T. 1831. 422. n. *Smith v. Parslow*, T. 1831. 423. n.

Attachment against sheriff for not bringing in the body. *Harrison v. —*, T. 1831. 531

A sheriff's bailiff covenanted with a sheriff to give him correct instructions for his returns, and to pay him all the costs of defending actions, or making or opposing motions, touching any matter in which the bailiff should act as such; and also to indemnify him against all expenses he might pay or be liable to, by reason of the executing, not executing, returning, not returning, or misreturn of any process, &c. occasioned by the act or default of the bailiff. The bailiff gave correct instructions for a return of *nulla bona*, which was accordingly made. An action being brought against the sheriff for that return, he sustained expence in defending it. Held, that the bailiff was liable to indemnify the sheriff for the amount. *Farebrother and another v. Worsley and others, executors of Hirst, deceased*, T. 1831. 424

SHERIFF'S OFFICER.

Memorandum of arrest by. See **EVIDENCE.**

SHIPS.

Where the owners of a ship, by an instrument called a charter-party, appointed *B.* to the command, and agreed that (the ship being tight, &c. and manned with thirty-five men) *B.* should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden for account of the owners), and proceed

therewith to *Calcutta*, and there re-load the ship with a cargo of *East India* produce, and return to *London*; and upon her arrival and discharge there, the intended voyage and service should end. And the owners further agreed, that the complement of thirty-five men should, if possible, be kept up, that they would supply the ship with stores, and that she might be retained in the service twelve months, or so much longer as was necessary to complete the voyage. In consideration of which, *B.* agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owners for the use and hire of the ship after the rate of 25*s.* per ton per month, of which 1000*l.* was to be paid on the execution of the charter-party, and 2000*l.* by two approved bills on *Calcutta*, one of which was to be payable one month, and and the other two months after her arrival there; the residue to be paid or secured to the satisfaction of the owners, on the arrival of the ship at *London*, and previous to commencing the discharge of her homeward cargo. (Certain other stipulations for payment of freight, if the ship were detained in *India*, were then made.) And it was further agreed, that *B.* should remit all freight bills for the homeward cargo to *Buckles and Co.* in *London*, who should hold them as joint trustees for the owners and *B.*; that they should first be applied to payment of the balance of freight due from *B.*, and the surplus, if any, be handed over to him. It was then provided that the owners should have an agent on board, who was to have the sole management of the ship's stores, and power to displace *B.* for breach of any covenant in the charter-party, and appoint another commander. *C. and Co.*, in *Calcutta*, having knowledge of this instrument, shipped goods on board the vessel for *London*, which were never delivered there. Held, that they could not recover against the owners, for by the agreement between them and *B.* he became owner *pro hac vice*, on these

grounds, 1st. he was to take the ship into his service for twelve months, at a certain rate per ton; 2dly, had the owners' agent displaced him from the command, he would have remained the freighter liable to the shippers; and lastly, the surplus freight belonged to him, and not to the owners, who had a remedy on the charter-party if no freight had been earned. *Newberry and Benson v. Colvin and others*, M. 1830. 55

SIGNATURE.

See ATTORNEY.

SITTINGS IN TERM.

See LOBING A TRIAL; NEW TRIAL.

SLANDER.

Case for defamation. — The first count stated, as inducement, that plaintiff was a livery-stable keeper, and by that trade and business acquired a profit. The last count stated that defendant spoke these words of and concerning the plaintiff, and of and concerning him in his said trade: — "You (meaning the said plaintiff) are a regular prover under bankruptcies," (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankrupt.) Verdict for plaintiff on all the counts. Held, on error brought, 1st, That the words did not impute a charge against the plaintiff in the way of his trade or business; and 2dly, That the innuendo imputing a crime punishable by law, was badly pleaded, as enlarging the natural meaning of the words used, without resting on any introductory averment of a colloquium respecting the proof of fictitious debts; and a *venire de novo* was awarded. *Alexander v. Angle*, M. 1830. 9

Where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute the want of some necessary qualification for, or some misconduct in it, they are actionable. *Secus*, if a clerk to a gas-light company is charged with immoral conduct with women,

that imputation having no reference to his office, the words not being laid to have been spoken of him in his office as clerk, nor proved to have occasioned him any special damage. Where the material part of the words declared on is proved to a jury, the verdict must be for the plaintiff; and a nonsuit will not be entered, though on demurrer of motion in arrest of judgment, it might be held that an action could not be maintained on the words proved. *Lumby v. Allday*, H. 1831. 217

SPECIAL CASE AND SPECIAL VERDICT.

Seemle, the attorney-general has not power to turn a special case into a special verdict, no leave having been given for that purpose at the trial. *Att. Gen. v. Dimond*, H. 1831.—296

SPIRITS.

See IMPORT AND EXPORT.

STOCK.

French stock belonging to an *English* testator, may be sold abroad by the *English* executor, and its proceeds administered by him here, without paying probate duty thereon. *Att. Gen. v. Dimond*, H. 1831. 243

Stock in foreign funds, locally situate abroad, is personalty following the domicile of the owner; therefore a bequest of such stock by a party domiciled in *England*, is liable to legacy-duty. *In the matter of the estate and effects of Robt. Ewing, deceased*, M. 1830. 91

TITHES.

The word "tithes" in an ancient document creating a rectory, will include composition for tithe, as well as tithe in kind, and the meaning can only be explained by subsequent usage in each particular case. *Beck and others v. Bree, Clerk*, M. 1830. 132

A modus of twopence-halfpenny an acre is not rank, and rankness is not weighed in very nice scales. S. C.

Ancient documentary evidence must be of a satisfactory and conclusive na-

ture, in order to overturn a modus, though not traced to a date near as early as that of the documents. *Beck and others v. Bree, Clerk*, M. 1830. 132

Where the order of birth of calves is ascertained, the tenth born is the only one to which the tithe-owner is at common law entitled, notice of the birth being given him: where the order of birth is not ascertained, he is to have one of average quality. A parochial custom of tithing, by which the tithe-owner had one calf out of ten or seven, each calf to be kept by the occupier five weeks, if fallen before 3d May, if after, to be kept one month, is good. *Treatman v. Carlington, Clerk*, H. 1831. 169

TOBACCO.

See IMPORT AND EXPORT.

TRADE.

An agreement in partial restraint of trade can only be supported by an adequate consideration. Thus an agreement, by which a brass-founder was to work exclusively for certain factors, for his and their lives, they not undertaking to find him full employ, but, on the contrary, reserving liberty to employ others to execute their orders in his trade if they should think fit, and to put an end to the agreement at three months' notice, is bad; though *London* and six miles round were left open to the party to take orders from. *Young and another, Assignees of Ireland, a bankrupt, v. Timmins and another*, H. 1831. 226

A note given by the bankrupt, for damages arising by his working for others, contrary to the above agreement, is void for want of consideration. S. C.

TROVER.

A. (Evers) being indebted to *B. (Haigh)*, gave him a delivery order for goods held by *C.*, a wharfinger (defendant *Kelshaw*). *B.* assented to the order, and *C.* transferred the goods to *B.* in his books. *A.* continuing indebted to *B.*, and being also indebted to *D. (Mellin, plain-*

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trades within the town, where a moiety of the penalty imposed by a by-law for breach of that custom, goes to the corporation. So *semble*, though the moiety be granted away by them, to a company, by by-law. *Davies v. Morgan and others*, T. 1831.

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Since 1 W. 4. c. 22. s. 4. a commission may issue to examine witnesses in any place out of the jurisdiction of the courts of law, on motion in that court of law in which the action shall be pending. *Ducket v. Williams*, T. 1831.

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WORK, LABOUR, AND MATERIALS.

See EXECUTORS.

WRIT.

The teste of a writ, if irregular, in naming a late Chief Baron instead of the existing one, may be amended on motion; and a rule for setting it aside was discharged. *Wakeling v. Watson*, E. 1831.

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END OF INDEX TO THE PRECEDING CASES.

ADDENDA ET CORRIGENDA.

- Page 16, note b. line 2, for "produce" read "dispute."
at end, add "See Moody & M. R. 24."
- 18, note c. add "See Richards v. Setree, 3 Pri. 197. acc."
- 20, line 4 from bottom, after "Bayley B." add "added."
- 21, note a. add "see p. 163."
- 52, 53, 54, for "Attorney General v. Bell," read "Attorney General v. Key."
- 81, 82. N.B.—These two pages are to be cancelled, and two corrected ones are substituted in the present Part.
- 94, lines 11, 12, for "James Ewing," read "Thomas Stonor."
- 97, line 10 from bottom of text, for "testate," read "intestate."
- 99, line 9, dele "held."
- 107, line 13, after "devastavit," add "see Toller 426."
- 116, note c. add "Pierson v. Hutchinson, 7 B. & C. 90."
- 118, as to last paragraph of Mr. B. Bayley's judgment, add "See 3 B. & C. 423. 426. 2 B. & C. 511. 7 Taunt. 278. 3 B. & A. 644."
- 180, as to *Rebuffus*, see *Hobart's R.* 155.
- 260, add to first marginal note, "should be provided for in the rule for a new trial."
- 262, line 3, for "specially," read "issuably."
- 276, note a. line 4, for "their" read "there" and dele comma.
- 285, end of note, add "5 Pri. 359. seems contra."
- 286, marginal note, after "verdict," add "after argument of the special case."
- 289, note, line 16, dele "*totidem verbis*."
- 293, add to note "see 1 M. & P. 559."
- 337, line 4 from bottom, of text, for "hold" read "held."
- 339, line 8, add a bracket] after "Melton. (b)"
- 378, line 6 from top, after "payment" read "of the debt."
- 386, 317, for "Dockett," read "Hockin," and add "see Thomas v Williams, 4 B. & C. 260. S. P."
- 420, Bevan v. Knight, add "see Fillis v. Stabb, 1 Y. & J. 373."
- 422, add in margin of Crosby v. Davis, "Terms of staying proceedings against sheriff for irregularity."
- 445, end of note, add "in suits by *quo minus*, Co. Lit. 295. a. Godbolt, 291."

APPENDIX

TO THE FIRST VOLUME

OF

TYRWHITT'S EXCHEQUER REPORTS.

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APPENDIX, N^o. I.

THE RULES AND ORDERS

IN FORCE IN THE

COURT OF EXCHEQUER OF PLEAS, DOWN TO MICHAELMAS TERM 1831, INCLUSIVE; COLLECTED AND ARRANGED UNDER PRACTICAL TITLES.

Together with those parts of Stats. 11 G. 4. & 1 W. 4. c. 70.; and 1 W. 4. c. 3. which relate to Practice.

(SEE LIST OF TITLES, ANTE.)

HOURS OF BUSINESS AT THE EXCHEQUER OFFICE.

By *Reg. Gen. Mich.* 2 W. 4. it is ordered, "That from and after the last day of this present term, the Exchequer Office of Pleas be kept open as follows: at is to say, during term, and one week after every term, from eleven o'clock in the morning until three o'clock in the afternoon, and from six to nine o'clock in the evening; and at other times from eleven o'clock in the morning until four o'clock in the afternoon; the usual holidays excepted, when the said office is to be closed.

By *Reg. Gen. Mich.* 1 W. 4. superseded by the above rule, the days on which this office was not directed to be open, were, "Sundays, Christmas-day, Good Friday, Easter Monday, Ascension and Midsummer-days, and days appointed for public feasts, thanksgiving, or fasts."

OFFICERS OF THE COURT, AND THEIR FEES.

Fees of Sworn and Side Clerks. By stat. 1 W. 4. c. 70. s. 10. it is enacted, "That it shall be lawful for the Barons of the said Court of Exchequer, and they are hereby required, to distinguish, by their rules and orders, the fees which shall continue to be taken by the sworn and side clerks of the Court, for the duties performed as officers of the Court, similar to the duties of the officers of the other superior Courts, from such fees and charges as shall be allowed to be taken by the attorneys so admitted to practise, so that the amount of such fees and charges, upon the whole, do not exceed the amount and rate of such fees and charges as are now allowed upon the taxation of costs."

By *Reg. Gen. Mich.* 1 W. 4. it is ordered by the Court, "That the several fees hereunder mentioned shall and may continue to be taken by the sworn and side clerks of this Court, the same being for duties to be performed by them as officers of the Court, similar to the duties of the other superior Courts. And it is

further ordered, that in the taxation and allowance of costs, such fees shall be distinguished from, and form no part of, the fees and charges which shall be allowed to the attorneys who have been or shall be admitted to practise, under and by virtue of the said act, but the same shall be allowed as disbursements:

The Fees above referred to.

	£	s.	d.
On process of <i>subpœna ad respondendum</i>	0	1	6
Filing affidavit of service of <i>subpœna</i>	0	1	0
Attachment for not appearing to <i>subpœna</i>	0	1	6
<i>Alias</i> and <i>pluries</i> attachment, each	0	1	6
One appearance in the paper book for one defendant	0	1	0
For every additional defendant	0	0	4
On special bail and filing	0	4	4
For taking bail off the file to produce in Court	0	1	0
Filing all affidavits (not excepted by act of Parliament), <i>postea</i> s, and inquisitions	0	1	0
Searching for all writs, affidavits and processes, each time, <i>per term</i>	0	0	4
Searching for judgment and all matters of record, <i>per term</i>	0	0	4
Office copies of all affidavits and other matters of record, <i>per folio</i>	0	0	8
Office copies of all rules, <i>per folio</i>	0	0	4
On taking all pleadings out of the office, 4d. <i>per folio</i> , according to the number, of folios marked on the pleading by the party filing the same, <i>per folio</i>	0	0	4
On filing declarations	0	0	4
Enrolling deeds and other matters requiring to be enrolled, <i>per folio</i>	0	0	4
For every warrant of attorney	0	0	4
For entering every rule	0	0	4
For drawing and copy of every order of Court, <i>per folio</i>	0	0	8
For exemplifying a record, <i>per folio</i>	0	0	4
For entering a <i>certiorari</i> out of Chancery	0	3	4

For acknowledging satisfaction on record	0	4	8
For every release	-	0	2
For entering an <i>audita querela</i>	-	0	3
For attending every trial at bar	-	1	0
For every exhibit read at a trial at bar	-	0	1
For entering all proceedings on writs of error, per folio	-	0	0
For enrolling writ of error	-	0	6
For office copies of all pleadings when required, per folio	-	0	0
For each writ of <i>superadeas</i> on an attachment	-	0	1

"That the several duties for which fees are appointed in the said schedule, shall be performed by the sworn and side clerks of the said office, or their sufficient deputies or deputy, on the request of the persons now or hereafter admitted to practise as attorneys in this Court, within the hours and times hereinafter appointed (see *ante*, p. i.), whereupon such fees as aforesaid shall become payable.

Clerk of Pleas.] That the several duties heretofore performed by the clerk of the pleas, or his deputy, at the instance of the sworn or side clerks of the office of pleas, shall hereafter, at the instance of, and for the attorneys admitted as aforesaid, be in like manner performed by the said clerk of the pleas, or his deputy, on payment of his lawful fees for the same.

OF ATTORNIES.

Admission of Attornies of K. B. and C. P. to be Attornies in the Exchequer.] By stat. 1 W. 4. c. 70. s. 10. it is enacted, "That all persons admitted or admissible to practise as attornies in the Courts of King's Bench and Common Pleas, shall be admissible in like manner as attornies of the Court of Exchequer, and be admitted and allowed to practise there as such, upon application to the barons of that Court, without being obliged to employ any clerk in Court in the capacity of attorney of the Court of Exchequer, any law or usage to the contrary notwithstanding; and that it shall be lawful for the barons of the said Court, and they are hereby required to distinguish, by their rules and orders, the fees which shall continue to be taken by the sworn and side clerks of the Court, for the duties performed as officers of the Court, similar to the duties of the officers of the other superior Courts, from such fees and charges as shall be allowed to be taken by the attornies so admitted to practise, so that the amount of such fees and charges upon the whole do not exceed the amount and rate of such fees and charges as are now allowed upon the taxation of costs.

Attornies of the Courts of Great Session may be admitted to be Attornies of the Courts at Westminster.] By stat. 1 W. 4. c. 70. s. 17. it is enacted, "That all attornies and solicitors now actually admitted and practising in any of the said Courts of Sessions (a) or Great Sessions, may be admitted as attornies of the said Courts at Westminster, in like manner as is now, or may be hereafter prescribed for the admission of other persons as attornies therein, upon payment of such sum for duty, in addition to the sum already paid by them in that behalf, as shall, together with such latter sum, amount to the full duty required upon admission of attornies in the said Courts at Westminster; and that all persons having served, or now actually serving, under articles as clerks to such attornies or solicitors of any of the said Courts of Sessions or Great Sessions, may, at the expiration of their respective times of service, be admitted as attornies of

the said Courts at Westminster; in like manner, and upon payment of the like duty, as if they had served under articles as clerks to attornies of the last-mentioned Courts."

Admission of Attornies of Great Sessions to practise at Westminster, in actions and suits against persons living in Cheshire or Wales.] By stat. 1 W. 4. c. 70. s. 16. it is enacted, "That all persons who on or before the passing of this act shall have been admitted as attornies, and shall then be practising in any of the Courts of Sessions or Great Sessions in the county palatine of Chester, or in Wales, respectively, shall be entitled, upon the payment of one shilling, to have their names entered upon a roll to be kept for that purpose in each of the superior Courts of Westminster, and thereupon be allowed to practise in said Courts in all actions and suits against persons residing, at the commencement of the suit, within the county of Chester or principality of Wales; and the all persons having served, or now actually serving, as clerks to such attornies under articles, and who would otherwise be entitled to be admitted as attornies of the said Courts of Great Sessions, may, on or before the expiration of six months after the passing of this act, be admitted as attornies of the said Courts at Westminster, for the purpose of practising there in the like matters only, without payment of any greater duty than would be now payable by law upon the admission as attornies of such Courts of Great Sessions respectively."

Attornies to enter their names and abodes in a book at the Exchequer office.] By Reg. Gen. Mich. 1 W. 4. it is ordered, "That the clerk of the pleas, or his deputy, shall forthwith cause to be prepared a proper alphabetical book, for the purposes after mentioned, and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk, without fee or reward. And that every attorney admitted in this Court, and residing in London, or within ten miles of the same, shall forthwith enter in such book, in alphabetical order, his name and place of abode, or some other proper place in London, Westminster, or the Borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this Court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book."

Service of Rules—Notices, &c. on.] And "That all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficient, served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid."

By Reg. Gen. Mich. 1 W. 4. it is ordered, "That in all actions, which, before the first day of this present term, were pending in this Court, the parties, plaintiffs or defendants, shall and may be at liberty to apply to one of the Barons of this Court, for an order appointing any person, who shall then be an attorney of this Court, to be his or her attorney in further prosecuting or defending such action, upon undertaking to pay the sworn or side clerk previously employed by him his costs incurred in such action, to be taxed, if required, by the master; and that service

(a) i. e. the Court of Sessions at Chester.

of such order on the opposite party or parties, or his or her attorney, shall be sufficient notice to him or them of such appointment."

OF AFFIDAVITS.

If two or more deponents, their names to be written in the jurat.] By Reg. Gen. Trin. 1 Geo. 4. it is ordered, "That from and after the first day of next term, upon every affidavit sworn in this Court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; (a) and that no affidavit be read or made use of in any matter depending in this Court, in the jurat of which there shall be any interlineation or erasure.

Affidavits of illiterate persons, sworn in Court or before the Lord Chief Baron or a Baron, must be certified to have been read to, and to be understood by the party.] And it is ordered, "That when any affidavit shall be sworn in Court, or before the Lord Chief Baron, or any one of the Barons, by any illiterate person, the officer or person who shall administer the oath, shall certify upon the affidavit, that the same was read to the illiterate person in the presence of such officer, and that the deponent appeared perfectly to understand the same."

Affidavits of illiterate persons, sworn before a Commissioner, to be read to them, and to be so certified in the jurat, and that the deponent understood it, and signed it in the presence of the Commissioner taking the same.] By Reg. Gen. Hil. 40 Geo. 3. it is ordered, "That from and after the last day of Easter term next, where any affidavit is taken by any commissioner of this Court, made by any person, who, from his or her signature, appears to be illiterate, the commissioner taking such affidavit shall certify or state in the jurat, that the affidavit was read in his presence to the party making the same, and that such party appeared perfectly to understand the same; and also that the said party wrote his or her signature in the presence of the commissioner taking the said affidavit."

Affidavits to be used in special applications to the Court.] By a General Order, Hil. 40 Geo. 3. after reciting that "Whereas great inconvenience hath arisen from affidavits being stated to the Court by counsel in special applications, without the same having been first filed; the Court doth order, that from and after the first day of next Easter term, all affidavits to be used on any special application to the Court, be filed one clear day before the application be made; and that where a notice of motion is necessary to be given, the filing of any affidavit in support of the application be also mentioned at the foot of the notice, to enable the opposite parties to obtain a copy therefrom.

"And where any application shall be made for an injunction to stay waste, or in the nature of an injunction to stay waste, before the defendant is in Court, supported by affidavit, such affidavit shall be filed, and the office copy thereof be produced, with the necessary certificate of the bill being filed.

"This order is not to extend to the filing of affidavits of mere service of notice of motion."

Office copies.] By a General Order, East. 2 G. 4. it is ordered, "That no office copy of any affidavit filed in this Court, be henceforth received and read, unless such office copy shall have been previously examined and signed by the attorney or clerk in court making the same, or his accredited agent."

(a) See *Wallings v. Marsh*, 11 Pri. 509. See v. Smith, E. 1831. 8 P. Tyr. MS.

OF SERVICE OF PLEADINGS, SUMMONSES, RULES, &c.

Service on the adverse attorney.] By Reg. Gen. Mich. 1 W. 4. it is ordered, "That service of all pleadings, summonses, orders, rules, notices, and other proceedings, heretofore served on the sworn or side clerks at their seats in the said office of pleas, shall hereafter be served upon the attorney or attorneys of the adverse party or parties, by delivering the same to, or leaving the same for him in the manner hereinafter mentioned; and that henceforth no entry of any notice shall be required to be made in any book to be kept in the said office of pleas as heretofore."

Attornies to enter their residences in a book.] And by Reg. Gen. same term, it is ordered, "That the clerk of the pleas, or his deputy, shall forthwith cause to be prepared a proper alphabetical book, for the purposes after mentioned, and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk, without fee or reward. And that every attorney admitted in this Court, and residing in London, or within ten miles of the same, shall forthwith enter into such book, in alphabetical order, his name and place of abode, or some other proper place in London, Westminster, or the Borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this Court, and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall, upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summonses, orders, or rules, for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid."

Where the defendant has appeared, or the plaintiff has entered an appearance according to the statute.] By Reg. Gen. same term, it is ordered, "That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered appearance therein, according to the statute, and the defendant shall, by an attorney of this Court, have given notice in writing to the attorney for the plaintiff, or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, and summonses, rules and orders, which, according to the practice of this Court, were heretofore delivered by the sworn or side clerks of the other party, plaintiff or defendant, be delivered to or served upon the attorney or attorneys of the other party, plaintiff or defendant; and that all notices, &c. shall be so served or delivered before nine o'clock in the evening."

TRANSFER OF CAUSES FROM THE COURTS ABOLISHED BY STAT. 1 W. 4. c. 70.

Modes of proceeding.] By Reg. Gen. Mich. 1 W. 4. after reciting that "Whereas, by an act made and passed in the first year of the reign of his present majesty, (viz. 1 W. 4. c. 70.) intitled 'An Act for the more effectual administration of justice in England and Wales,' it is amongst other things enacted, that

all the power, authority, and jurisdiction of his majesty's Court of Session of the said county palatine of Chester, and of the judges thereof, and of his Court of Exchequer of the said county palatine, and of the chamberlain and vice-chamberlain thereof, and also of his judges and courts of Great Sessions in the principality of Wales, shall cease and determine at the commencement of the said act; and that all suits at law then depending in any of the said Courts, shall be transferred to the Court of Exchequer, there to be dealt with and decided according to the practice of the said Court of Exchequer or of the Court from whence the same shall be transferred, according to the discretion of the Court to which the same shall be transferred; which Court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of this act by the Court from whence such suit shall be removed. This Court doth therefore order, that, as to all suits at law depending in any of the said Courts on the 12th day of October last past, the same shall be dealt with and decided according to the practice of this Court, unless this Court, or a baron thereof, at chambers, shall, upon special application upon notice to an adverse party, otherwise direct. And it is further ordered, that where process shall have been served, and the plaintiff shall not have declared, the plaintiff shall be at liberty to declare on all process returnable before or in the present term, or before or in next Hilary term, or the vacation following the same, as if the same, as to all process returnable before the end of this present term, had been made returnable in the present term; and as to all process returnable between the end of the present term and the vacation next following next Hilary term, as if the same had been returnable of next Hilary term; and the defendant shall appear to such process, or put in bail thereto, within eight days after notice of this rule; as to writs, the return days whereof shall then be past, as to writs returnable after the end of the present term, within six days after the same shall be returnable; and the defendant shall be at liberty to give a rule to declare, and in default of declaration, to sign *non pros* accordingly. And it is further ordered, that in all cases in which a declaration hath been delivered or filed in the Court of Sessions, a certificate thereof shall be obtained under the hand of the late prothonotary, or late deputy prothonotary of the Court in which the same shall be filed, and be verified by affidavit to be entitled in this Court; and such certificate and affidavit shall be filed with the deputy clerk of the pleas, without fee or reward; and the plaintiff shall thereupon be at liberty to give a rule to plead, and in default of plea, to sign judgment in like manner as if the declaration had been filed in this Court, an appearance having been first duly entered in this Court, if the same shall not have been entered in the said Court in which such suit was commenced. And each party shall be at liberty to plead, reply, or take any subsequent proceeding, and to rule an adverse party to proceed in such action, as if the same action had been originally commenced in this Court; but that no judgment shall be signed for want of declaration, plea, replication, or other proceeding, until a rule to declare, plead, reply, rejoin, &c. shall have been first given in the office of pleas of this Court, and demand of declaration, plea, replication, or other proceeding in writing, served on the adverse party or his attorney, according to the practice of this Court, so many days before such judgment shall be signed, as the practice of this Court requires upon rules to declare, plead, reply, rejoin, &c. And it is further ordered, that in case any interlocutory or final judgment shall have been signed in any of the said Courts abolished by the said act, the plaintiff, on filing a cer-

tificate thereof as aforesaid, shall be at liberty to proceed thereon, in like manner as if such judgment had been signed in this Court; but that in case process of execution shall issue on any final judgment, signed in any Court abolished by the said act, it shall be stated in such process in what Court final judgment was so signed as aforesaid. And it is further ordered, that any proceeding taken in any Court abolished by the said act, may be continued, by way of suggestion, in this Court, such suggestion being subject to correction, upon a summons for the purpose, by any of the barons of this Court.

That in case any process shall have issued out of any of the Courts abolished by the said act, the sheriff to whom the same may have been issued, may be ruled to return such process into this Court, in like manner as if the said process had been returnable in this Court; and if such sheriff shall have made a return to the said Court so abolished as aforesaid, or shall make a return to this Court of *expi corpus*, he may be ruled in like manner to bring in the body, and process so issued as last aforesaid, may be returned to this Court by the sheriffs of the county of Chester, county of the city of Chester, and principality of Wales, in like manner as if the same had been returnable in this Court.

OF WRITS.

Issue of Writs regulated.—Of the Precipe, and the indorsement of the attorney's name on writs. By Reg. Gen. Mich., 1 Wm. 4. it is ordered, "That henceforth the name and address of the attorney using any writ shall be indorsed or written thereon: (a) and also, that the day, month, and year, in which the same shall be issued, shall be indorsed or written on all writs hereafter to be issued in the office of pleas of this Court; and if the same be *mesne process*, other than a writ of *subpoena ad respondendum*, a *precipe* particular of such writ, containing the county into which the same shall issue, the names of every party, plaintiff and defendant therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be so issued, shall be delivered to the clerk or deputy clerk of the pleas, on his being required to sign such writ, which *precipe* shall be duly filed on file to be provided by the said clerk of the pleas, or his deputy, for each term and vacation, according to the county into which the same shall be issued; and if such process be *subpoena ad respondendum*, and process of contempt thereon, and writ of *superseas*, then the *precipe* shall in like manner be left with the sworn or side clerks, or their deputies, in the office of pleas, containing the names of every party, plaintiff and defendant, therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be issued; which shall be kept on a similar file by the sworn and side clerks. To which *precipes* any attorney of this Court, or his clerk, shall have access, on payment of the fee payable in respect thereof."

Precipes for subpoenas and attachments.—Filing affidavits of service of subpoenas. By Reg. Gen. East. 45 Geo. 3. it is ordered, "That, from and after the first day of next Trinity term, *precipes* for all *subpoenas* and attachments that are issued in the office of pleas of this Court, with the names of the parties therein, the returns of such writs, the dates when they are issued, and the names of the attorneys or side clerks issuing the same, shall be given to the officer who signs such writs, to require the name of the clerk of the pleas to be set thereto, on issuing such *subpoenas* and attachments."

(a) See *Miller v. Bowden*, 2 Tyr. R.

and that, on the issuing of all attachments for want of appearance, the affidavits of service of the *subpoenas* upon which such attachments are issued, shall be filed on a file to be kept for that purpose in the said office."

More than four Defendants in one Action.] By Reg. Gen. Mich. 1 W. 4. it is ordered, That where there are more than four defendants in a joint action to be commenced in this Court residing in the same county the whole number of defendants shall be named in one writ, and if the whole number of defendants shall appear by the same attorney, and at the same time, the names of all the defendants shall be inserted in one appearance.

When writs shall be returnable.] By stat. 1 W. 4. c. 3. [passed 23rd Dec. 1830] it is enacted, § 3, that all writs now usually returnable before any of H. M.'s courts of K. B., C. P., or Exchequer respectively, on general return days, that shall be made returnable after 1st Jan. 1831, may be made returnable on the 3rd day exclusive, before the commencement of each term, or on any day not being Sunday, between that day and the 3rd day exclusive, before the last day of the term; and the day for appearance shall as heretofore be the 3d day after such return, exclusive of the day of the return, or in case such 3d day shall fall on a Sunday, then on the 4th day after such return exclusive of such day of return.

OF THE DISTINGAS.

Increase of Issues.] By Reg. Gen. Trin. 26 Geo. 2. it is ordered, "That, from and after the first day of Michaelmas term, 1753, where issues shall be returned upon any writ of *distingas*, to be issued out of this Court, the plaintiff in such writ may, immediately after the return thereof, apply by motion to the Court for increasing issues upon further process to be issued between the parties, which said issues shall be increased from time to time at the discretion of the Court. But see *Pennell v. Kingston*, ante p. 495.

And it is further ordered, that where any defendant shall appear to any writ of *distingas* to be issued out of this Court, after the said first day of Michaelmas term, and the cause of action ariseth in London or Middlesex, and the defendant lives in London or Middlesex, or within forty miles of London, such defendant shall plead within four days after declaration delivered in such action, a rule to plead being given; and if the cause of action ariseth in any other county, or the defendant lives above forty miles from London, then such defendant shall plead within eight days after the delivery of the declaration, a rule to plead being given as aforesaid." See *Lambe v. Blount*, 6 Pri. 639. post. tit. *Distingas* in Digest of Cases.

OF THE SUBPENA AND SERVICE THEREOF.

Copies of subpoenas to be served instead of labels.] By Reg. Gen. Mich. 1 W. 4. it is ordered, "That a copy of all process of *subpoena ad respondendum* hereafter to be issued out of this Court, and of any indorsement thereon, shall be served; and no service thereof shall be effected as heretofore by service of any label or other minute thereof." See *Taylor v. Riley*, 9 Pri. 389. post. Digest of Cases. Held, that *subpoenas ad respondendum* may be issued out of the office of pleas, and such process need not be signed by the chief secondary, or a sworn clerk in the office of the King's Remembrancer; and that the rules of Court, of Hil. 19 Jac., and Mich. 36 Car. 2. requiring this, are obsolete, and of no force.

SUBPENA AND ATTACHMENT.

No arrests on attachments except for bailable cause of action and attachment indorsed for bail.] By Reg. Gen. Trin. 1 W. 4. 31st May 1831. Whereas, since the statute of 7 and 8 Geo. 4. c. 71. instances have occurred in which, upon proceedings in the Court of Exchequer, by way of *subpoena* and attach-

ment, defendants have been arrested upon writs of attachment, notwithstanding the same have not issued for a bailable cause of action, and it is desirable that such practice shall be discontinued, It is therefore Ordered, that, from henceforth, no arrest shall be made upon any such writ of attachment, unless the same shall be for a bailable cause of action, and shall be duly marked and indorsed for bail. (a)

APPEARANCES.

Appearances to be entered in books.] By Reg. Gen. Mich. 1 W. 4. it is ordered, "That on every appearance to be entered by the sworn or side clerks, as officers of the said office of pleas, they shall cause to be put the name and address of the attorney at whose instance, and the day on which the same shall be entered, and such appearance shall be entered by the defendant's name, by the said sworn clerks, in proper books, having an alphabetical index book of reference, entered by the plaintiff's name, to be provided by the clerk of the pleas for each term; which books shall be open to the inspection of the said attorneys so admitted as aforesaid, and their clerks, without fee or reward."

Where several defendants appear by same attorney, and at the same time, the names of all the defendants shall be inserted in one appearance. See ante.

BAIL.

IN ERROR. See Error.

IN TROVER OR DETINUE.

By Reg. Gen. Hil. 48 Geo. 3. it is ordered, "That, from and after this Hilary term, no person be held to special bail in any action of *trover* or *detinue*, without an order made for that purpose by the Lord Chief Baron, or one of the Barons of the Court."

AMOUNT OF BAIL.

By Reg. Gen. Mich. 61 Geo. 3. it is ordered, "That, from henceforth, in all bailable cases, for any sum exceeding 1000*l.* it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to."

(a) *Towers v. Benham, Exchequer, June 8, 1831.*—*Godson* moved for an alias attachment against the defendant. A subpoena had issued for a debt of less than 20*l.* and was served according to the old practice by leaving it at the defendant's house. No appearance having been entered within four days after the return, the plaintiff by the same practice became intitled to issue an attachment. It issued, but the sheriff not being able to take the defendant, and no appearance being entered on the subpoena, a return of *non est inventus* was made. Before the issuing the alias attachment for want of such appearance, the Rule of Court of 31st May (ante, 519) was promulgated, and the officer had in consequence refused to issue such a writ.

Per Curiam. The rule of court in directing that defendants should not be arrested on attachments except for a bailable cause of action did not prohibit attachment from issuing. The ground of such arrests being a contempt of court, fails where no personal service of process appears. And on that account, the Court must be satisfied that defendant keeps out of the way to avoid personal service. The plaintiff may serve the defendant personally with a copy of an *alias* attachment, subjoining thereto an English notice, to appear at a certain day.

Such a writ was accordingly engrossed, but the sealer refused to seal it, declaring it an unusual writ.

On Saturday, June 11th, *Godson* stated this fact. The Court ordered the sealer to attend on the 13th, the last day of term. He attended accordingly, but the plaintiff, whose object had been frustrated by the lapse of time, proceeded no further. *Tyr. MSS.*

OF PUTTING IN, INQUIRING AFTER, AND NOTICE OF BAIL.

Bail pending body-rule.] By *Reg. Gen. Mich.* 1 W. 4, it is ordered, "That whenever a plaintiff shall rule the sheriff, on a return of *cepi corpus*, to bring in the body, the defendant shall be at liberty to put in and perfect bail, at any time before the expiration of such rule; and that a plaintiff having so ruled, the sheriff shall not proceed on any assignment of the bail bond; until the time has expired to bring in the body as aforesaid." See *Ladd v. Wilson*, 1 Tyr. 18.

Inquiring after bail.] By the same Rule, It is Ordered, "That if the plaintiff is desirous of time to enquire after the bail, and shall give one day's notice thereof, as aforesaid, to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time."

Notice of bail—contents.] And it is further ordered, "That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder." — *Same Rule*.

EXCEPTION TO BAIL.

By *Reg. Gen. Trin.*, 26 & 27 Geo. 2. it is ordered, "That, from and after the first day of Michaelmas term, 1753, in every action in this Court, where special bail is put in before the Barons in this Court, the plaintiff may except thereto within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff, his attorney, or clerk in court; or where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the said bail is transmitted to and allowed by one of the Barons of this Court, and notice thereof given in writing, as aforesaid. But no exception to bail shall be admitted after the time hereinbefore limited; and in case exception shall be taken to the said bail within the time aforesaid, and notice of such exception shall be given in writing to the defendant's attorney, or clerk in court, the defendant shall perfect his bail, and justify the same, if the notice be given, in term time, within four days after such notice; [but if exception be taken in vacation time, and notice thereof given in like manner, the said defendant shall perfect his bail and justify the same upon the first day of the subsequent term, unless the plaintiff, his attorney, or clerk in court, shall consent to a justification before one of the barons of this Court, in which case the said bail shall justify themselves before one of the barons, within four days after notice of such exception in writing given to the defendant, his attorney, or clerk in Court (a)], and in default of the defendant's justifying his bail [in either of the said cases (a)], the plaintiff shall be at liberty to proceed on the bail bond."

NOTICE OF JUSTIFICATION OF BAIL.

Time of service.] By *Reg. Gen. Trin.* 59 Geo. 3. it is ordered, "That, from and after the last day of this term, every notice for justifying bail in person shall be served before eleven o'clock in the forenoon

of the day on which, according to the present practice, such notice ought to be served, except in case of a rule of Court, or an order of a judge for further time; in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such rule or order shall be granted."

Affidavit to state time of service.] "And, in all the cases aforesaid, the affidavit of service shall state that such notice was served before the hour of eleven or three o'clock, as the case may be."

CHANGING BAIL.

By *Reg. Gen. of K. B., C. P., and Exch. Trin.* 1 W. 4. it is Ordered, "That the bail, of whom notice shall be given, shall not be changed without leave of the Court or a judge."

OF THE RECOGNIZANCE OF BAIL.

Taking recognizances of bail out of court.] By *Reg. Gen. of K. B., C. P., and Exch. Trin.* 1 W. 4. It is Ordered, That if the plaintiff shall not give one day's notice of exception to bail, by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

By *Reg. Gen. Mich.* 1 W. 4, it is ordered, "That all recognizances of bail in actions in the said office of pleas, when taken or allowed by a baron, shall be left by the attorney for the defendant or defendants, with the sworn or side clerks, or their deputy, in the office of pleas, until duly allowed; who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference; which book shall be open to the inspection of the attorneys so admitted as aforesaid, or their clerks; and notice of such bail being allowed and filed in the said office of pleas, with the names, descriptions, and address of the bail, shall be given by the attorney for the defendant or defendants, to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail; the former rules of this Court, and proceedings may be thereupon had for excepting to, and perfecting such bail, within the times and in like manner as is and are prescribed by the existing rules and practice of this Court, except so far as the same may be altered by the present, or any subsequent rule of this Court."

JUSTIFICATION OF BAIL.

When.] By *Reg. Gen. of K. B., C. P. and Exch. Trin.* 1 W. 4, 1831, it is ordered, "That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday."

Where.] — By *Reg. Gen. Mich.* 1 W. 4. it is ordered, "That hereafter all special bail shall be justified within four days after exception, before a baron, at chambers, as well in term as in vacation."

But by *Reg. Gen. Hil.* 1 W. 4. the old practice of justifying bail in open Court in term, was restored as follows: "Whereas by a rule of this Honourable Court, made in Michaelmas Term last past, it was ordered, that hereafter all special bail should be justified before a Baron at chambers, as well in term as in vacation. And, whereas it is expedient to repeal so much of the said rule as relates to the justification of bail in term time. It is therefore ordered, That from and after the present term, the justification of bail in term time shall, unless by consent, take place as heretofore in open court, and that the justifications of bail before a Baron at chambers shall be confined to cases of consent and to justification in vacation."

By *Reg. Gen. East.* 56 G. 3. — "From this day (15th May, 1816) the justification of bail in open Court shall be taken at the sitting of the Court before the other ordinary business."

(a) But see as to the matter within brackets, *Reg. Gen. M. T. & H. T.* 1 W. 4. tit. Justification of Bail.

in custody of the gaoler of the county gaol of any county in England or Wales, by virtue of any process issued out of any of his Majesty's superior Courts of record, he may be rendered in discharge of his bail in any action depending in this Court, in like manner as is hereinbefore provided for a render in discharge of bail; and thereupon the bail shall be wholly exonerated from liability as such bail."

OF RULING THE SHERIFF TO RETURN THE WRIT AND BRING IN THE BODY, AND TAKING AN ASSIGNMENT OF THE BAIL BOND.

Ruling the sheriff to return the writ.]—By *Reg. Gen. Hil.* 19 G. 2. it is ordered, "That, for the future, instead of a rule of amercement, to be served upon any sheriff, officer, or other person having return of process to be issued out of the office of pleas, there shall be served upon such sheriff, officer, or other person having return of process, a peremptory rule, requiring him or them to return such process within six days after notice thereof to be given to him or them; and if such sheriff, officer, or other person, do not return the said writ within that time, he or they shall be liable to an attachment."

See also *Reg. Gen. Mich.* 1 W. 4. *ante*, p. vi.; and *Trin.* 26 G. 2. *ib.*

DECLARATION.

Against prisoners, see title "PRISONERS," *post*.

After a *distringas*, see *ante*, p. v.

Rules to declare, &c.]—By *Reg. Gen. Hil.* 16 G. 3. it is ordered, "That, from and after the first day of next Trinity term, rules to declare, to reply, rejoin, rebut, surrebut, demur, and join in demurrer, may be given sixteen days after the end of each and every term."

Of the time for declaring—Notice to plead—Time for pleading—Imparance—Signing judgment for want of a plea, &c.] By *Reg. Gen. Mich.* 5 G. 3. it is ordered, "That from and after the first day of next Hilary Term, upon all process to be issued out of this Court, returnable the first or second return, or on any day before the second return of any term, where the defendant shall, at the return thereof, enter an appearance or file special bail (as the case may require), the plaintiff may deliver over a declaration to the defendant's clerk in court; and if the plaintiff declares in London or Middlesex, and the defendant lives within twenty miles of London, such defendant shall plead to the said declaration within four days after the delivery thereof, without any imparance; and in case the plaintiff declares in any other county, or the defendant lives above twenty miles from London, then the defendant shall plead within eight days after the delivery thereof, without any imparance; or, in default thereof, the plaintiff may sign judgment, a rule to plead being duly given, unless this Court, or one of the Barons thereof, shall think proper, on the special circumstances of the case, to grant an imparance; but no defendant shall be compelled to plead by virtue of this rule, unless the declaration be delivered four days before the end of the term in which the writ is returnable, with notice thereon indorsed of the time wherein such defendant is to plead.

Where a plaintiff would have been heretofore entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice given four days exclusively before the end of the term in which the process was returnable, he may now do so on giving two days' notice exclusively, if a rule to plead have been given.] By *Reg. Gen. Hil.* 60 G. 3. it is ordered, "That, in all cases, wherein the plaintiff, by the present

practice of the court, would be entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice thereof given, ten days exclusively before the end of the term in which the process is returnable, the plaintiff shall, from and after the first day of next Easter Term, be at liberty to sign such judgment, provided the declaration be delivered or filed, and notice thereof given two days exclusively before the end of the term within which the process is returnable, a rule to plead having been duly entered."

By *Reg. Gen. Trin.* 26 G. 2. it is ordered, "That from and after the first day of Michaelmas Term 1783, where any declaration shall be delivered to any defendant, his attorney, or clerk in court, before the assign day of any term, and the defendant shall appear until the next term, and such defendant shall live in London, or within forty miles thereof, and the cause of action shall arise in London or Middlesex, such defendant shall plead to the said declaration within the first four days of such next term, a rule to plead being duly given; and in default thereof, the plaintiff shall be at liberty to sign judgment.

Rules as to declaring de bene esse made abroad Mich. 1 W. 4. 1830.

By *Reg. Gen. Mich.* 5 G. 3. it is ordered, "That, from and after the said first day of next Hilary Term, upon all process of *quo minus* to be issued out of this Court, returnable the first or second return, or on any day before the second return of any term, where the defendant shall be served with a copy thereof, pursuant to the act of parliament for preventing frivolous and vexatious returns, the plaintiff may file a declaration in the office of pleas of this Court *de bene esse* at the return of such process, and likewise give notice thereof to such defendant, by delivering an English notice, written in a plain legible hand, to the said defendant, or by leaving the same at the last or most usual place of abode of such defendant, signifying that there is a declaration filed in the said office against such defendant at the suit of the plaintiff, and that, unless such defendant plead to such declaration within ten days after service of such notice, (in case the plaintiff declares in London or Middlesex, and the defendant lives within twenty miles of London, but if the plaintiff declares in any other county, then within eight days after service of such notice), judgment will be signed against such defendant by default; and that from the time of service of such notice, such declaration shall be deemed well delivered to such defendant, and not otherwise; and if the defendant does not appear and plead within the time specified in such notice, the plaintiff having entered an appearance for such defendant according to the said act, and having duly given a rule to plead, may sign judgment, unless this Court, or one of the Barons thereof, shall think proper, on the special circumstances of the case, to grant an imparance.

"And it is further ordered, That, from and after the said first day of next Hilary Term, upon all process of *quo minus* to be issued and made returnable as aforesaid, where an affidavit shall be made and filed of the cause of action pursuant to the said act, the declaration may be filed *de bene esse* at the return of such process, with a notice to plead in manner before specified; and if the defendant puts in bail, and doth not plead within the time specified in such notice, judgment may be signed, a rule to plead being duly given, without any notice or further calling for a plea, unless the Court or a Baron shall grant an imparance as aforesaid; and the plaintiff may in either case give notice of executing a writ of inquiry, either by delivering a notice in writing to such defendant, his attorney or clerk in court, or by leaving the same at his

See as to time for *delivering* declarations *de*
u. Reg. Gen. Trin., 1 W. 4. next column.

same: it is ordered, that from and after the last day of this term, ingrossments on paper of all declarations and other pleadings, shall be duly made on stamp, and filed or delivered by the parties respectively declaring or pleading, within the times prescribed by the rules and orders of this court for filing and delivering declarations or other pleadings respectively: and it is further ordered, that a book be kept in the office of pleas, wherein entries shall be made of declarations so filed." [Obsolete as to stamps, since stamps on law proceedings were abolished by 5 G. 4. c. 41.]

COSTS ON DECLARATIONS IN ASSUMPSIT ON BILLS, NOTES, AND COMMON COUNTS, AND ON DECLARATIONS IN DEBT WHERE ASSUMPSIT WOULD LIE.

Reg. Gen. Trin. in K. B. C. P. and Exchequer, 1 W. 4., 1831. "Whereas declarations in actions upon bills of exchange, promissory notes and the counts, usually called the common counts, occasion unnecessary expence to parties by reason of their length, and the same may be drawn in a more concise form; Now for the prevention of such expence, it is ordered, that if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions, annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or if any declaration in *debt* to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the the cause; and such costs of the excess as have been incurred by the defendant, shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff."

Taxation of costs in respect of length exceeding that prescribed by this rule.] "And it is further ordered, That on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill."

FORMS OF NEW COUNTS.

See the Counts of which the schedule annexed to the Regula Generalis consists, ante, p. 526-531.

PARTICULARS OF DEMAND AND SET-OFF.

Particulars of demand must be delivered with certain declarations and notices of declarations.] By *Reg. Gen.* in K. B. C. P. and Exchequer, last day of *Trin. T.* it is Ordered, "That with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *Indebitatus Assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts; where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios."

Costs where particulars not so delivered.] "And to secure the delivery of particulars in all such cases, it

is further ordered, that if any declaration or notice shall be delivered without such particulars, or without statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons in the purpose of obtaining such order, or of the particulars he may afterwards deliver."

Copy of particulars of demand and set-off to be annexed to records when entered with Marshal.] "And that a copy of the particulars of the demand, and the particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the Judge's marshal."

IMPARLANCE, TIME TO PLEAD, PLEADING, SIGNING JUDGMENT FOR WANT OF PLEA, &c.

See ante, p. viii.

PLEADING SEVERAL MATTERS.

Rules to be drawn up on judges' order.] By *Reg. Gen.* K. B., C. P. and Exch. last day of *Trin. T.* 1831, it is ordered, "That no rule to shew cause, or rule shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up on the judge's order, to be made upon a summons, accompanied by a short abstract or statement of the pleaded pleas, avowries or cognizances."

Cases where no order necessary.] Provided, "That no summons or order shall be necessary in the following cases, that is to say, where the plea of non sumptit, or nil debet, or non detinet, with or without a plea of tender as to part, a plea of the statutory limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy, and conviction of any two or more of such pleas shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the ingrossment of the pleas, or a draft or copy thereof."

NON PROS, JUDGMENT OF.

Non-pros.] By *Reg. Gen.* K. B., C. P. and Exch. last day of *Trin. T.* 1831, it is ordered, "That judgment of non pros. shall be signed for want of declaration, replication, or other subsequent pleading until four days next after a demand thereof shall be made in writing, upon the plaintiff, his agent or agent, as the case may be."

RULE TO REPLY, REJOIN, &c.

See Reg. Gen. Hil. 16 G. 3, ante, p. viii.

DEMURRER.

By *Reg. Gen. Trin.* 26 G. 2, it is ordered, "That in all cases, where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney or clerk shall be obliged to accept of notice of execution of inquiry on the back of the joinder in demurrer, in cases where there the defendant pleads a demurrer, to which the plaintiff is obliged to demur, such case the defendant's attorney or clerk shall be obliged to accept of notice of execution of inquiry, on the back of such demurrer, and

ordered, that, in all cases where the plaintiff sues to the defendant's plea, replication, or other subsequent pleading, and the defendant joins in defence, the plaintiff shall be at liberty to enter the plea in law upon the roll, and move for a *concilium*, not giving the defendant any rule to bring in the plea of demurrer."

Demurrer Books.] *Reg. Gen.* 31st May, 1831. It is ordered, that it will not be necessary to give a rule to the plaintiff in demurrer books, but a motion for a *concilium* may be made without it, and it will be sufficient to deliver the books to the Barons two days before the day of argument.

Reg. Gen. Mich. 9 G. 4, after reciting that, whereas great expense is often unnecessarily incurred in making up demurrer books, from setting out those parts of the pleadings to which demurrers are applied; it is ordered, that, from and after the first day of this term, when there shall be a demurrer to any part of the declaration, or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates, shall be set out into the demurrer books, and if any other parts be copied, the master shall not allow the costs of so doing on taxation, either as between party and party, or as between attorney and client."

PAYING MONEY INTO COURT.

Reg. Gen. Mich. 5 G. 3, it is ordered, "That, after the first day of next Hilary Term, where the defendant in any action, brought in the office of this court, shall pay to the plaintiff in such action, or to his attorney, any sum of money, which he admits to be due on such action, together with the costs of such action, to be taxed by the deputy-clerk of the pleas; if the plaintiff accepts thereof in full discharge of such action, all proceedings in the said action shall be at an end; but if the plaintiff does not accept thereof in full discharge of such suit, then the defendant shall pay such sum of money, which he admits to be due, and the said sum of money, so brought in, shall be considered as struck out of the account, and be paid out of court to the plaintiff, or to his attorney; and upon the trial of the issue between the parties, the plaintiff shall be permitted to take as much for so much only as he shall prove beyond doubt."

NOTICE OF TRIAL OR INQUIRY, AND COUNTERMAND.

Reg. Gen. Hil. 16 G. 3, it is ordered, "That, after the first day of next Trinity Term, in all cases where the *venue* is laid in the country (and a notice of trial is not necessary), ten days notice (exclusive of the day given) shall be given of sufficient notice; but if the *venue* be laid in London or Middlesex, and the defendant resides above forty miles from London, then the plaintiff shall be given fifteen days notice of trial, exclusive of the day the notice is given, unless a Baron shall think fit to order otherwise: and it is further ordered, that six days notice of countermand, exclusive of the day the notice is given, shall be deemed sufficient notice in all cases where the *venue* is laid in the country, unless the defendant is obliged to take short notice of

term, eight days notice shall be given of the execution of writs of inquiry in all cases, except where the *venue* is laid in London or Middlesex, and the defendants reside above forty miles distant therefrom; and that where the *venue* is laid in London or Middlesex, and the defendants reside above forty miles distant therefrom, fourteen days notice of the execution of writs of inquiry shall be given."

Rule as to notice of trial.] By *Reg. Gen. East.* 57 G. 3, it is ordered, "That all notices of trial, in causes on the plea side of this court, for the sittings after term in London and Middlesex, shall, in case the defendant or defendants reside at a less distance from the cities of London or Westminster than forty miles, be given eight days before the day appointed or to be appointed by the Lord Chief Baron, for the trial of the same causes; and in case the defendant or defendants reside forty miles or upwards therefrom, then that such notices of trial shall be given fourteen days before such day appointed or to be appointed by the Lord Chief Baron as aforesaid, one day being considered inclusive and the other exclusive."

Notice of inquiry.] By *Reg. Gen. Trin.* 26 G. 2, after reciting, "That, in divers actions and suits, commenced in this court, the plaintiff, many times in pleading, concludes to the country, and the defendant not being obliged to join issue or demur till four days after, the plaintiffs are thereby delayed; for the prevention of which for the future, it is ordered, that, from and after the said first day of Michaelmas Term, in all cases where the plaintiff concludes to the country, the plaintiff's attorney, or clerk in court, may give notice of trial at the time of delivering his replication or other subsequent pleading, in case issue shall be joined therein, or of executing a writ of inquiry in default of joining issue, which shall be deemed good notice of trial from the time of the delivery of such replication or other subsequent pleading, in case issue shall be joined; and if the defendant doth not join issue on such replication or other subsequent pleading, and the plaintiff doth sign judgment for want thereof, the defendant's attorney or clerk in court shall take notice of executing a writ of inquiry from the time that notice thereof was given as aforesaid: And it is further ordered, that in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney or clerk in court shall be obliged to accept of notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case where the defendant pleads a dilatory plea, to which the plaintiff is obliged to demur, in such case, the defendant's attorney or clerk in court shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer."

By *Reg. Gen. Hil.* 39 G. 3, it was ordered, "That notices of trial or inquiry should be entered in a book at the exchequer office, and a written notice of such entry served on the clerk in court." But see later rule of *Mich.* 1 W. 4. as to service of notices, *ante*, p. iii.

EXAMINATIONS ON INTERROGATORIES.

The party exhibiting interrogatories before a master, for examination of the adverse party, cannot set down exceptions taken to the examination for insufficiency, to be argued before the Court, but must obtain an order to refer it to the master, to review his report, and to report thereon, with liberty to except.] By a general order of Easter Term, 3 G. 4, after reciting "That the Court, being informed where one party in a cause exhibits interrogatories before the master, for the examination of the other party, pursuant to a decree or order of the Court, that if the examination of the party be deemed insufficient, it has heretofore been the practice to take

eight days notice to be given of the execution of writs of inquiry, except where the *venue* is laid in London or Middlesex, and the defendants reside above forty miles distant therefrom, and in those excepted cases fourteen days notice shall be given.] By *Reg. Gen. Hil.* 39 G. 3, it is ordered, "That, from and after the last day of this

exceptions to such examination, which have been set down to be argued before the Court—do consider such practice to be improper; and do order, that, in future, in all cases where an examination shall be put in to interrogatories exhibited before the master, the party complaining of the insufficiency of such examination, do obtain an order to refer it to the Master who settled the interrogatories, to look into and report to the Court, whether the same be full and sufficient or not, with liberty to the parties to except to the Master's report, if they shall be advised."

Quere if this order relates to the plea side of the court?

NOTICE OF TRIAL—ENTRY OF CAUSES.

Notice of trial of causes entered for trial in London and Middlesex, within term, to be given two days before the day of sitting, except in cases of adjournment, and then notice must be given before eight o'clock in the evening of the preceding day.] By *Reg. Gen. Trin.* 29 G. 3, it is ordered, "That all causes to be entered for trial in London and Middlesex, shall be entered as follows: (that is to say), if notice of trial shall be given at any sitting within term, two days before the day of sitting; and if at a sitting after term, before eight of the clock in the evening of the day before the day on which such sittings shall be adjourned; and that if the same shall not be so entered for such sitting respectively, a *ne recipiatur* may be entered."

By *Reg. Gen. Hil.* 32 G. 3. after reciting that, "Whereas, by an order made in Hilary Term, in the 14th year of the reign of his late majesty king George the Second, by all the judges of England, for preventing inconveniences to suitors, it was ordered, amongst other things, 'That no writ or record of *Nisi Prius* should be received at the assizes in any county in England, unless they should be delivered to and entered with the marshal before the first sitting of the Court after the commission day, except in the counties of York and Norfolk; and there the writs and records should be delivered to and entered with the marshal before the first sitting of the court, on the second day after the commission day.' And whereas many inconveniences do happen to the suitors, and to the sheriffs and jurymen, and to the public business of the assizes in the county of Norfolk, from the delay in entering the writs and records for the trial of the causes; now, to prevent such inconveniences for the future, it is ordered, by all the judges of England, that no writ or record of *Nisi Prius* shall be received at the assizes in and for the county of Norfolk or city of Norwich, unless such writ and record shall be delivered to and entered with the marshal before the first sitting of the Courts, on the day next after the commission day."

Annexing particulars of demand and set-off to records. See p. x.

SITTINGS AT NISI PRIUS.

Order, *East.* 49 G. 3: "The Lord Chief Baron has directed, that, in this term, and for the future, the sittings in London shall be holden at the Guildhall of the said city, on the second day next preceding the end of the term; and that the sitting for the county of Middlesex shall be holden in the Court of Exchequer, in Westminster-hall, on the day next preceding the end of the term; and that the sitting in London after each term shall be holden on the second day after the end of the term; and that the sitting after each term in Middlesex shall be holden on the sixth day of the sittings next after the end of the term."

Sittings in term.] By *Reg. Gen. Mich.* 1W.4, 1830, it is ordered, "That, hereafter there shall be two days

appointed for the trial of causes at *Nisi Prius* in term, in London, and the like in Middlesex, to be named by the Lord Chief Baron of this Court, previous to the commencement of each term; and that, on such examination, the said Lord Chief Baron shall also appoint the hour at which the Court will sit on each of these days."

Days of London Sittings after Term.] By *Reg. Gen. Hil.* 1W.4, 1831. it is ordered, "That from and after this present term, the sitting day at *Nisi Prius* at the Guildhall in and for the city of London, shall be the second day after every term, and that such sitting shall be adjourned until such day as the Court shall then direct. And it is further ordered, That in every notice of trial brought to be given for the sittings after any term to be holden at the Guildhall aforesaid, it shall be specified whether the cause is intended to be tried on the first day of such sittings, or at the adjournment-day, and that in every case in which such notice shall specify that the cause is to be tried at the adjournment-day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant or defendants reside above forty miles from the said city of London, and four days before the said first day if the defendant or defendants reside within that distance."

SIGNING JUDGMENT.

See p. viii.

JUDGMENT AS IN CASE OF NONSUIT.

By a general rule of Easter Term, 5G.4, it is ordered, "Ordered by the Court, that no rule for judgment in case of a nonsuit be granted in the next term of issue joined; unless it appears, on the face of the affidavit on which the motion is founded, that the plaintiff had given notice of trial, and had neglected to proceed to trial." See *Simons v. Fiddling*, ante, p. 501.

WARRANT OF ATTORNEY.

No judgment to be signed on any warrant of attorney not delivered to and filed with the Master.] By *Reg. Gen. Mich.* 43 G. 3, it is ordered, "That, from and after the first day of Hilary Term next, no judgment be signed upon any warrant, authorizing any attorney to confess judgment, without such warrant being delivered to and filed by the Master, who is hereby directed to file the same in the order in which they shall be received."

Deafeazances to be written on the same paper as the judgment, and a memorandum of the substance thereof to be made by the person preparing the instrument. "And it is further ordered, That every attorney or solicitor in the office of pleas of this court, or any other person who shall prepare any warrant to confess judgment in the office of pleas aforesaid, shall be subject to any defeazance, do cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written, and cause a memorandum in writing to be made of the warrant of attorney, containing the substance and effect of such defeazance."

TAXING COSTS.

Costs, notice of taxation of.] By *Reg. Gen. K. B., C. P. and Exch.* last day of *Trin. T.* 1830,

and it is further ordered, That before taxation of s, one day's notice shall be given to the opposite party."

Reg. Gen. Mich. 1 W. 4, it is ordered, That one day's previous notice of the time of payment of costs upon rules, orders, town postea, and writs; and a copy of the bill of costs, and affidavit to increase, if any, shall be given and delivered to the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the party or parties in the same action, at the time of service of such notice; and that, in the case of writs and inquisitions in country causes, the notice shall be given two days, and the copy and affidavit served two days before such taxation."

ERROR.

Reg. Gen. Trin. 26 G. 2, it is ordered, "That, after the first day of Michaelmas Term, all writs of error shall, without delay, be delivered to one of the clerks of the Lord Chief Baron of this Court for the time being, in order to be allowed, according to the practice of this Court; and that no person shall be allowed from suing out execution under pretence of a writ of error before such writ of error be allowed, and notice thereof given to the plaintiff in the writ, or his clerk in court; and in cases where special bail is required, if the plaintiff in such writ of error do not, within four days after the allowance of the writ, put in bail according to law, the defendant may proceed to execution, notwithstanding such writ of error; and if the bail so put in shall be excepted to, and notice of such exception shall be given in writing to the attorney or clerk in court for the writ of error in term time, such bail shall be permitted and justified within four days after notice so given of such exception, or the defendant in error may, in default thereof, proceed to execution, notwithstanding such writ of error; but where notice of such exception shall be given in vacation time, then such bail shall be permitted and justified upon the first day of the next term, unless the defendant in error, his attorney, or clerk in court, shall consent to a justification before one of the barons, in which case such bail shall be permitted and justified before a baron within four days after notice of such exception given in writing to the plaintiff in error, his attorney, or clerk in court: and in default of such justification, the defendant in error may proceed to execution, notwithstanding such writ of error: but it is further ordered, that where bail shall be put in upon any writ of error, and notice of such exception shall be given in writing as aforesaid, if the defendant in error shall not except thereto, and give notice of such exception in writing to the attorney or clerk in court for the plaintiff in error, within twenty days after notice shall have been given of putting in bail, that then such bail shall become absolute, and no exception shall be taken afterwards to the

want of bail.] *By Reg. Gen.* 33 G. 2, it is ordered, "That, from and after the first day of next term, in all cases where special bail is required upon writs of error, if the bail of the plaintiff in error be obliged to justify, then the said bail shall each be obliged to justify himself in double the sum recovered by judgment on which the writ of error is brought, where the penalty of a bond or other speciality is required by such judgment; in which case each bail shall justify in such penalty only; and except in cases of ejectment, where (if bail shall be put in upon the writ of error) each of such bail shall be obliged to justify in double the improved annual rent or value of the premises, messuages, lands, and tenements recovered in such ejectment."

EJECTMENT.

By Reg. Gen. 26 G. 2, it is ordered, "That, from and after the first day of Michaelmas Term, 1753, where judgment in ejectment shall be moved for in an issuable term, and the premises in question do not lie in London or Middlesex, the plaintiff shall be at liberty to sign judgment, unless an appearance be entered to such ejectment, within four days after the last day of such term."

By Reg. Gen. Hil. 39 G. 3, it was ordered, "That, in all country ejectments which are moved in a term not issuable, the defendants shall have four days next after the end of the issuable term immediately succeeding the respective terms which such ejectments are moved, to appear thereto." But—

Appearance, by tenant in possession in country ejectments served before the assign of Michaelmas or Easter Term, to be within four days after the end of such Term.] *By Reg. Gen. East.* 2 G. 4, it is ordered, "That in all country ejectments which hereafter shall be served before the assign day of a Michaelmas or Easter Term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter Term, and shall not be postponed till the fourth day after the end of the Hilary Term or Trinity Term next respectively following." And see 11 G. 4. & 1 W. 4. c. 70. s. 36. *infra*.

Serving declarations in ejectment before first day of term.] And now by *Reg. Gen. K. B., C. P. and Exch.* last day of Trin. T. 1831, it is further ordered, "That declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the assign or first general return-day."

The common consent rule, extended to compel the defendant to specify for what premises he intends to defend, and to admit possession by himself or tenant, at the time of service of the declaration in ejectment.] *By Reg. Gen. East.* 2 G. 4, after reciting that, "Whereas by the common consent rule, in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only: and whereas, in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession, at the time the ejectment was brought, of the premises mentioned in the ejectment; and, for want of such proof, have caused the plaintiff to be nonsuited: And whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provision therein contained for the defendant's insisting on his title only:

"It is therefore ordered, that, from henceforth, in every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend; and shall consent, in such rule, to confess upon the trial, that the defendant, if he defends as tenant, (or, in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises: and that, if, upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant; then no costs shall be allowed for not further prosecuting the same; but the said defendant shall pay costs to the plaintiff in that case to be taxed."

Landlord's mode of recovering possession where right of entry accrues immediately after Hilary and Easter Terms.] *By stat.* 11 G. 4. & 1 W. 4. c. 70. s. 36. it is enacted, "That in all actions of ejectment hereafter

to be brought in any of his Majesty's Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a declaration in ejectment, intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto, within ten days, in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; provided also, that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his Majesty's superior Courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes; and that it shall be lawful for the Judge in his discretion to make such order in the said cause as to him shall seem expedient."

Declaration to be intituled specially.] And by s. 37. it is enacted, "That in making up the record of the proceedings on any such declaration in ejectment, it shall be lawful to intitle such declaration specially of the day next after the day of the demise therein, whether such day shall be in term or in vacation, and no judgment thereupon shall be avoided or reversed by reason only of such special title."

Writ of possession may issue on certificate of judge, &c.] And by sect. 38. it is enacted, "That in all cases of trials of ejectments at *Nisi Prius*, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession ought to issue immediately; and upon such certificate a writ of possession may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued: Provided always, that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly, that the cause came on for trial at *Nisi Prius*, at such a time and place, and before such a judge, (naming the time, place, and judge), and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately."

OF PRISONERS AND INSOLVENTS.

Declarations against prisoners.] By Reg. Gen. Trin. 26 G. 2. it is ordered, "That, from and after the said first day of Michaelmas Term [1753], no copy of a declaration delivered at the Fleet Prison, against any prisoner there, shall be a sufficient charge to hold such prisoner to bail, or to detain such prisoner to custody for want of bail, unless an affidavit, that the plaintiff's cause of action amounts to [10*l.*] 20*s.* since 7 & 8 G. 4. c. 71., or upwards, be first made

and filed in the office of Pleas, and an indorsement made by the plaintiff's attorney or clerk in court, on such copy of a declaration, signifying the sum of money specified in such affidavit; for which sum indorsed bail shall be required, and no more."

Defendants, whether prisoners or not, must plead on or before the day of the declaration filed, &c. on last day of term.] By Reg. Gen. K. B., C. P., and Excheq. last day of Trin. 1831, it is ordered, "That upon every declaration, delivered or filed, on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead in or out of any term without being entitled to any imparlance."

Discharge of prisoners by superseas.] By Reg. Gen. Trin. 26 G. 2. it is ordered, "That, from and after the said first day of Michaelmas Term, in all cases where a prisoner is or shall be taken, detained, or charged in custody by *mesne* process, issuing out of this Court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the gaoler or turnkey of the prison where such prisoner is or shall be detained or charged in custody, before the end of the next term after the return of the process, by virtue whereof such prisoner is or shall be taken, detained, or charged in custody, and cause an affidavit to be made and filed in the office of Pleas in this Court, of the day of such declaration, and of the time when, and the person to whom the same was delivered, by the first day of the next term after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of *superseas*, to be granted by the Court or one of the Barons thereof, upon entering appearance; unless, upon notice given to the plaintiff's attorney or clerk in court, good cause shall be shewn to the contrary; and in case of a commitment or surrender to the Fleet prison in discharge of bail before a declaration delivered, unless the plaintiff shall cause a copy of a declaration to be delivered as aforesaid, before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged out of custody by writ of *superseas*, to be granted as aforesaid, upon entering appearance; unless, upon notice given to the plaintiff's attorney or clerk in court, good cause shall be shewn to the contrary: And it is further ordered, that in all cases after a declaration delivered as aforesaid, at the Fleet, or any other gaol or prison, unless the plaintiff shall proceed to judgment thereupon within the next term after such declaration delivered, if, in the course of this Court, the plaintiff could so proceed (of which three terms, the term wherein such declaration shall be delivered shall be taken to be one), or in case of a surrender in discharge of bail, after a declaration delivered, unless the plaintiff shall proceed to judgment thereupon within three terms next after such surrender, and due notice thereof, if, in the course of the Court the plaintiff could so proceed (of which three terms, the term wherein such surrender shall be made shall be taken to be one), the plaintiff shall be discharged out of custody by writ of *superseas*, to be granted as aforesaid, upon entering appearance; unless upon notice given to the plaintiff's attorney, or clerk in court, good cause shall be shewn to the contrary; and in all cases after judgment obtained against any prisoner in the Fleet or any other gaol or prison, unless the plaintiff shall cause such prisoner to be charged in execution on the said judgment, within two terms next after such final judgment shall be obtained, (of which two terms, the term wherein such final judgment shall be obtained shall be taken to be one), in case no error shall be depending on such judgment, or any writ of error shall be depending thereupon, within two terms next after the judgment shall

ced, or the writ of error shall be *nonprossed* or discontinued, including the term in which such affirmation of the judgment, or *nonprossed* or discontinuance of writ of error shall be obtained, or, in case of a order in discharge of bail, after final judgment rendered, unless the plaintiff shall proceed to cause defendant to be charged in execution upon the said sentence, within two terms next after such surrender, due notice thereof, (of which two terms, the term in which such surrender shall be made shall be taken one), in case no writ of error shall be dependent on such judgment; but if any writ of error shall be pending thereupon, then within two terms next after the judgment shall be affirmed, or the writ of error shall be *nonprossed* or discontinued, including the term in which such affirmation of the judgment, or *nonprossed* or discontinuance of the writ of error shall be made, the prisoner shall be discharged out of custody by *supersedeas*, to be granted as aforesaid; unless, notice given to the plaintiff's attorney or clerk at court, good cause shall be shewn in either of the cases to the contrary: And it is further ordered, in all cases where a prisoner shall be taken, detained, or charged in custody of any sheriff or other officer, by *mesne* process of this Court, and shall afterwards be removed by writ of *habeas corpus*, and committed thereupon by this Court, or any of the Barons of the Court, to the Fleet Prison, the time for the plaintiff's proceeding against such prisoner shall commence and be computed from the prisoner's being first taken, detained, or charged in custody by virtue of such process. And lastly, it is ordered, that no treaty or agreement shall be sufficient cause to prevent any defendant's giving the benefit of a *supersedeas* for want of prosecution, unless the same be in writing, signed by the defendant, or his attorney, or clerk in court, or some other duly authorized by the defendant, and it be expressly expressed that proceedings are stayed at the defendant's request."

[*Intents.*] By *Reg. Gen. Mich.* 3 Geo. 4. "To prevent unnecessary expense to plaintiffs suing in this Court, in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of insolvent debtors — It is ordered, that, in such notice given to any plaintiff, no prisoner shall be superseded or discharged out of custody at the instance of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given, until some rule or order shall be made in this Court in that behalf by this Court or one of the Barons thereof."

And it is further ordered, that a copy of this rule shall be hung up in the Fleet Prison, in the place where the rules of this Court are usually hung."

Reg. Gen. Easter, 58 Geo. 3. applications for the discharge of insolvent debtors can only be made at the next day of the Court, when the other business of the day shall be over.

FORMA PAUPERIS.

By *Reg. Gen. Easter*, 3 Geo. 1. it is ordered, "That no person, for the future, shall be admitted in *forma pauperis*, unless the attorney to be assigned, or his clerk, attend a Baron, with a petition for his admission; and that no counsel shall be assigned, unless such counsel only who hath certified the cause of action and petition."

OF GIVING A TERM'S NOTICE.

By *Reg. Gen. Trin.* 26 Geo. 2. it is ordered, "That, from and after the first day of Michaelmas term, 1753, in all causes in which there have been no proceedings for four terms, exclusive of the term in which the last proceeding was had, the party who desires to proceed again, shall give a term's notice to the other of his intended proceeding, and such notice shall be given before the assign day of the fifth, or other subsequent term; and that a Baron's summons, if no order be made thereupon, shall not be deemed a proceeding; but a notice of trial, though afterwards countermanded, shall be deemed a proceeding within the rule."

BARON'S SUMMONS.

[*Summonses before a Judge confined to two.*] By *Reg. Gen. K. B., C. P., and Exchequer, Trin.* 1831, it is ordered, "That hereafter it shall not be necessary to issue more than two summonses for attendance before a judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary."

By practice of exchequer, a Baron's summons does not operate as a stay of proceedings.

ARBITRATION AND AWARD.

By *Reg. Gen. Trin.* 3 Geo. 4. 1822; when a rule to shew cause is obtained to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute must be stated in the rule to shew cause.

COMMENCEMENT OF RULES.

By *Reg. Gen. K. B., C. P., and Exchequer, last day of Trin.* 1831, the rules [of this Term affecting the three Courts of common law] shall take effect on the first day of next Michaelmas term [1831], except the rule as to the service of declarations in ejectment, which shall take effect from 25th October next [1831].

APPENDIX, N^o. II.

RULES AND ORDERS

RELATING TO

EXTENTS.

[FROM MANNING'S PRACTICE.]

Trinity Term, 23 Eliz. 14th June.

In avoiding unnecessary delays it is ordered by the Court, that every person appearing from henceforth in this Court as defendant to any information of intrusion, or to any information upon any penal statute, or to any impleading in the Office of the Treasurer's Remembrancer, or to any action in the Office of Common Pleas, and in the same term wherein he doth make his first appearance, shall be forborne, and not by some rule of the Court be compelled to put in his answer, but shall have day over till the next following term by imparlance, or otherwise generally without any special day prefixed; that then by the general rule of this Court, the tenth day of the said next term, is and shall be the peremptory day for every such defendant to put into the Court his sufficient plea; and if the said tenth day shall be passed and no such plea put in, the attorney for the plaintiff is to move the Court between whom, and for what matter the cause is, and that the time of the general rule is past; and then upon such motion the Court is to take special order by a last peremptory day, or by awarding of some costs or other penalty, or by awarding such process, or otherwise, as the Court shall think meet, against such defendant making default.

Michaelmas Term, 34 & 35 Eliz. 24th November.

It is ordered by the right honourable the Lord High Treasurer of England, John Fortesque, esquire, Chancellor and Under Treasurer of this Exchequer, and the Barons of the same Court, that from henceforth no assignment of any debt shall be assigned and set over to her Majesty by any person or persons whatsoever, but such as shall be allowed of and appointed to be re-

tained by the said Lord Treasurer, Chancellor and Barons in the open Court (a).

Termino Sancti Hilarii Anno 15 Caroli, Mercurii
12 die Februarii.

Assignment of debts.

Whereas upon complaint made of abuses formerly touching assigning of debts to his Majesty, and in causing of debts to be found by inquisition upon bonds taken in his Majesty's name, for the payment of moneys to some of the King's farmers, receivers or other accountants; the Lord Treasurer, Lord Cotesgrave, Lord Chief Baron and the rest of the Barons of the Court, and Sir John Banks, Knight, his Majesty's Attorney General, having conferred together, and taken mature consideration for reforming the said abuses for the future, have thought fit, and do order that no debts be assigned to the King, or found by inquisition for the King's debtors or accountants in any save such as are originally due to them *bond fide*, without any manner of trust (b), and according to the directions and instructions hereafter following, viz.

1. He who assigneth any debt to the King shall take this oath, viz.

Oath of an assignment.

The within named A. B. maketh oath the day of the date within written, that the debts hereby assigned are just and true debts, and have not formerly been

(a) Vide Book of Orders, No. 18.

(b) See Stat. 7 Jac. c. 15. 4 Inst. 115. Hob. 253 Hardr. 403.

suit in any other Court, and that the same are in proper debts, originally due unto him *bond fide* without any trust, and that he hath not received nor any part thereof, except, &c.

He who desireth any debt or debts to be found by it in his aid shall take this oath.

Oath to grant an extent in aid.

I, said B. maketh oath the day and year above, that he is justly indebted unto (A.) one of the messengers of his Majesty's Customs, &c. and that the debt is a just and true debt originally due to the said A. *bond fide* without any manner of trust, and he said debt hath not been put in suit in any Court, and that he hath not received the same any part thereof, except so much, &c. And that he is justly indebted to him the said B. originally and *bond fide* without trust, and that C. D. is much indebted in his estate, so that unless a speedy course be taken against the said C. the said debt by him owing great danger to be lost.

How far debts are seizable.

That no further inquisitions shall be taken for an aid than to inquire and seize the lands, debts, and personal estates of him that is debtor to the King's or accountant, unless it be by special order in an open court (a).

What debts are assignable.

No debts without speciality shall be assigned to an aid in case of debts in aid (b).
No debts without speciality shall be found by inquisition for debts in aid, unless it be by order upon an open Court, and except it be for debts due to the King's farmers. (c)

Immediate Extents.

That no immediate process of extent be awarded in aid but in cases of extremity, and upon an order be taken as aforesaid.

Scire facias.

That every *scire facias* for such debts shall be returned into the proper county where such debtors are mentioned in the speciality to reside, unless upon an order *facias* returned in London and Middlesex.

Bonds to receivers.

That where bonds are taken in the King's name, as to the King's farmers, receivers, &c. they before any extent go forth, make oath or certify in their hands to the court, that such bonds are, from the time of taking such bonds were, for just and true debts originally owing to themselves *bond fide*, and they are not in trust or for the benefit of any other person.

Deputies to receivers.

That the receivers, collectors and bailiffs have no deputies than are necessary for the King's service, and that such deputies be neither tradesmen nor artificers.

per Dⁿum The.
per Dⁿum Cottingham.
per Capital' Baron.
per Baron' Trevor.
per Baron' Weston.
per Baron' Hendon.
per Joh^m Banks, Mil.

Gen. 34 & 35 Eliz. M. 1592. No debt assigned and set over to the king by any persons but such as shall be allowed of, and ap-

pointed to be retained by, the lord high treasurer of England, Chancellor, and Barons of the Exchequer in open Court.

Orders and Rules of Proceedings in the Office of His Majesty's Remembrancer of his Court of Exchequer at Westminster, which the Right Hon. Sir Edward Atkins, Knight, Lord Chief Baron of the same Court, Sir Thomas Jenner, Knt. Sir Richard Heath, Knt. and Sir Christopher Milton, Knt. the other Barons of the same Court, have thought fit at present to ordain and publish for the better and more speedy carrying on the business in that Office.

Taking of costs.

That in all cases where costs are to be taxed, upon a bill of costs in the office of his Majesty's Remembrancer, his Majesty's Remembrancer is to tax the costs, but shall not tax the same without notice given to the attorneys on both sides to attend him.

Serving of sheriffs or under-sheriffs with orders.

That where a sheriff or under-sheriff is ordered to perform any thing by order of the Court, serving of the sheriff or under-sheriff with a true copy of such order under the seal of the court, and affidavit made thereof, and warrant thereupon from one of the Barons, shall be a sufficient service to bring the said sheriff or under-sheriff in contempt, if he does not perform the same.

Pleadings upon personal informations.

Every defendant appearing upon a personal information or *quo warranto*, except informations of seizure, is to plead to the same within four days of the next term after his appearance to the same, or in default thereof, judgment by *nihil dicit* to be entered; and where a defendant being served with process to appear to an information, shall neglect to appear the same term, and is taken upon process of contempt returnable the following term, he shall then plead within four days after his appearance.

Joining in demurrer.

When a demurrer is filed the defendant shall join in demurrer within six days, or else judgment by *nihil dicit* to be entered.

Informations and other matters in law.

When a replication is filed, the defendant shall rejoin within four days, or else judgment by *nihil dicit* to be entered.

Rules upon returns of scire facias.

Upon writs of *scire facias* returned the last day of the term, and upon inquisitions then returned whereon goods are seized, rules may be given for the defendants to appear upon such writs of *scire facias*, and to claim the property of such goods seized by the sealing day after each term; and in default thereof, proceedings to be had in each case respectively as where there are days in term for giving such rules.

Notice of trials.

Notice of all trials in London or Middlesex to be given six days before such trials; and of trials at assizes, notice to be given within six days after the end of the term.

Entering judgment after trials.

Upon the return of every *postea* judgment to be entered within four days, upon a rule given, if nothing be said to the contrary, upon trials in London or Middlesex. And within the term judgment to be entered of the same term. And upon trials at the bar judgment to be entered within four days after such

trial, if there be so many days in term; and if there be less than four days in term, then judgment to be entered the last day of the term.

Irregularities in proceedings.

That all differences touching irregularities in proceedings upon the rules of the Court shall be determined by his Majesty's Remembrancer or his deputy, upon hearing the attorneys on both sides, who is to settle the same, if he can, and give costs where he shall find the fault, if not, the Court to determine the same.

Attendance of officers upon the court.

That his Majesty's Remembrancer or his deputy, and the sworn clerks in the office, do diligently attend in court, and do give an account touching any proceedings in court, as they shall be required.

All former rules not contrary hereunto are to be observed.

*Edward Atkins.
Tho. Jenner.
Richard Heath.
Christopher Milton.*

N. B. These rules were made between the beginning of Easter term 2 James II. and the latter end of Easter term the 3 James II. because Atkins was made Chief Baron, and Milton Baron in Easter term 2 James II. and Powell was made Baron in Easter 3 James II. — *Manning's note.*

Lunnæ, 13 die Maii 1689.

It is this day ordered by the Court, that the rules above mentioned shall be made an order of this Courts and that the same shall be entered amongst the order, and rules of this Court.

Termine Sancti Michaelis Anno tertio Willielmi et Mariæ, Sabbati, 14 die Nov. 1691.

Extents to find debts to issue on motion.

It is this day ordered by the Court, that one of the Barons of this Court be attended with the bond wherein the party is debtor to the King, before any extent do issue to find debts in aid without specialty in the vacation time; and that no extent do issue in the term time to find any debts in aid without specialty, but by motion in open Court (a).

(a) Vide Book of Orders, No. 99.

Sabbati, 31 die Maii 1712.

Clause added to extents.

Upon the motion of Mr. Attorney General it is ordered by the Court, that in all extents next before the words *modo habetur* (in the Clause which relates to goods, chattels, debts and credits) these words following be inserted, viz., *aut aliquis alius in futurum pro eo vel ad ejus usum* (a).

Termine Sanctæ Trinitatis Anno nono Regni Regiæ Geo. I. Mercurii 3 die Julii 1723.

Rules touching Seizures, and other Matters.

Notices of Trial.

That notice of all trials be entered in a public book to be kept for that purpose; and that notice of all trials above sixty miles from London, in Easter and Michaelmas terms, be fourteen days before such trial; and in all cases within sixty miles of London be ten days at least before such trials; and that notice of all trials, in Trinity and Hilary terms, above sixty miles from London be ten days at least, and within six miles of London eight days at least, except on seizures in the port of London, and issues arising in London and Middlesex, the trials on which seizures are to be on, six days notice: and that all countermands of trials be entered in the same book two days at least before the day of trial, unless in country cases, and then four days before trial; and if the said countermand be entered in the book two days or four days aforesaid before trial, the defendant in such case, will out special order, is not to be entitled to costs.

Signing Recognizances.

That no recognizance be taken without being signed either by the deputy, or in his absence, by one of the sworn clerks.

*James Montague.
Ro. Price.
Fran. Page.
Jeff. Gilbert.*

Affidavit of danger.

By Reg. Gen. Trin. 3 Geo. 4. No fiat for an extent in aid shall be hereafter granted unless the party applying for the same, or some person or persons on his behalf, should make affidavit that unless the writ of extent for the debt due to him from his debtor forthwith issued, the debt due to the crown from the party applying would be in danger of being lost to the crown.

(a) Vide Book of Orders, No. 128.

A P P E N D I X, N^o. III.

AN ANALYTICAL INDEX

TO THE

MODERN CASES

IN

THE EXCHEQUER OF PLEAS,

RELATING TO THE

PROCESS OF EXTENT,

AND TO

PRACTICE IN GENERAL :

FROM EASTER TERM, 32 GEO. III. TO TRINITY TERM, 1831.

Collected from the Reports of ANSTRUTHER, FORREST, WIGHTWICK, PRICE,
M'LELLAND, YOUNGE, JERVIS, CROMPTON, and TYRWHITT.

ABATEMENT, PLEADING IN.

[*ous steps.*] If a defendant wishes to avail himself of a plea in abatement, he must justify bail (as put in his plea) within the first four days after return of the writ, whether the plaintiff except to or not. *Maund v. Manley*, Forrest, 149.

[*for Pleading — Setting aside Interlocutory Judgment.*] The Court set aside a judgment signed, in support of a plea (without costs), where a defendant's cause appeared on the 11th November to be returnable on the 3d, and filed a plea in abatement on the 13th, the plaintiff not having been served. *Kirby v. Hunt*, 13 Pri. 178.

[*to set aside a notice of declaration filed was sent into the Court, to solicitors there, as agents of the plaintiff, to serve the defendant therewith, and they returned on the 6th (from Stafford) that the defendant had been served; the service having been effected before the first day of full term, was not considered by the Court, under the circumstances, as a nullity, to have precluded the defendant from pleading in abatement within four days after his appearance and being duly entered.* S. C.

[*joinder.*] Where several persons, unknown to the plaintiff, are named in a plea of abatement, the Court will order the defendant to furnish particulars in support of the places of residence and additions of the persons named; and for a noncompliance with such order will quash the plea. *Newton and others, v. Lloyd and others*, 1 Y. & J. 257. See *Lloyd v. Lloyd*, 1 Tyr. 533.

[*of the truth.*] An affidavit of the truth of a

plea in abatement, sworn nine days before the delivery of the declaration to which it is pleaded, will not support such plea. *Westerdale v. Kemp*, 1 Tyr. 260. S. C. noun. *Bower v. Kemp*, 1 C. & J. 287.

Plea in abatement set aside for irregularity, on the objection, that the affidavit in support of it had been sworn before the plaintiff's attorney, as a commissioner for taking affidavits in the Court of Exchequer in the country. *Cooper v. Archer*, 12 Pri. 149.

If a plea in abatement be not supported by a proper affidavit, the plaintiff may sign judgment immediately. *Richards, gent. one, &c. v. Setras*, 3 Pri. 187.

A mistake of the parties to the suit in the title to such an affidavit, renders it sufficient to support the plea, although it refers expressly to the annexed folio, in which the title of the cause is right. Quære, whether an attorney of another court is entitled to plead his privilege in abatement against the privilege of the officers of this Court? S. C.

The Court will not permit cause to be shown, before the day for which the rule is drawn up, for the sake of enabling the party to save the term; *sed quære*, if that be suggested at the time of the application? Nor will they impose terms with a view to expedite the execution of a Court of equity. S. C.

ACTIONS.

[*Election of Action.*] Where a vessel is seized and returned forfeited for smuggling and the seizing officer also prosecutes in the Admiralty as for a prize, the Court of Exchequer will not make him elect. *Att. Gen. v. Appleby*, 3 Anst. 863.

Semb. The crown should move for a prohibition. —S. C.

AFFIDAVIT TO HOLD TO BAIL.

It is no objection to an affidavit to hold to bail, that it is sworn by a deponent, a third person, who does not shew himself to be in any way connected with the creditor, or to have any means of knowing of the existence of the debt. Nor is it any objection, that such a person swear positively that the debtor has not made any tender in bank-notes to the creditor, although he (the creditor) be living in England. *Lee v. Selwood*, 9 Pri. 322.

A debt sworn to be due for use and occupation, will support an arrest. And it is a sufficient statement of the cause of action, in an affidavit to hold to bail, that it is for use and occupation of premises of the creditor. If the statement proceeds to say, "as tenant thereof," it is no objection to it that it do not add "to the creditor." S. C.

An affidavit of debt made for the purpose of holding a party to bail on a promissory note, held insufficient in not stating that the note was due and unpaid, or that the holder was payee or indorsee. *Bill v. Rogers*, 12 Pri. 194.

An affidavit made and tendered by the defendant in support of the motion, stating that nothing was, in fact, due from him to the plaintiff, altogether rejected as inadmissible. S. C.

Where a defendant, arrested in this country for the same cause of action for which proceedings had been instituted in the Supreme Court of New South Wales, applied to be discharged from custody on entering a common appearance, and deposed that by the practice of that court, when process was issued, and *non est inventus* returned, an attachment issued (which proceeding had been adopted against him in New South Wales,) whereupon defendant's goods were seized and rendered to plaintiff in execution, unless bail were put in to pay the condemnation money, and that either the one or the other must have taken place against him, at the suit of the plaintiffs according to the practice of that court. The court refused to discharge him, being of opinion that the affidavit did not shew clearly that the plaintiffs had the same remedy in the colony which they might have in this country. *Naylor and others v. Egar and Forbes*, 2 Y. & J. 99.

Semble where under process from the Supreme Court of New South Wales (4 G. 4. c. 96.), the goods of a defendant are attached and rendered to plaintiff in execution, or bail are put in to answer the condemnation money, he cannot be arrested for the same cause of action here. *Ib.*

No objection can be taken arising out of an affidavit not referred to in the rule nisi. *Ib.*

Variance between affidavit of debt; and cause of action, is no ground for discharging defendant out of custody on entering a common appearance before the declaration is filed. *Ib.*

Where in a joint action one defendant is arrested, and there are no means of compelling the appearance of his co-defendant, so that after declaration he will be entitled to a supersedeas; the court will not entertain an application for his discharge till the declaration is filed. *Ib.*

A defendant cannot be held to special bail on an affidavit stating him to be indebted to plaintiff in respect of a certain sale of land in possession of defendant. *Sykes and others v. Ross*, 2 Y. & J. 2.

An affidavit to hold to special bail, stating that the defendant was indebted to the plaintiff by virtue of certain articles of agreement, by which the latter agreed to sell, and the former to purchase certain lands, and that defendant had been let into possession in pursuance of the agreement, is sufficient, without stating that a conveyance had been tendered to the defendant. *Young v. Dowlman*, 2 Y. & J. 31.

Affidavit that defendant was indebted to plaintiff

"as secretary of a society" for money had received to his use is bad, and defendant was discharged on filing common bail. *Whitchurch v. Wang*, 3 Anst. 797.

An affidavit to hold to bail for penalties incurred by unlawful insurances against the lottery act, 27 G. 3. c. 1., need not state the sums received as premium, or the persons from whom received. *Rex v. Davis*, 3 Anst. 862.

An affidavit by an executor, of a debt due to his testator, "as appears from a statement made from the testator's books," by an accountant employed by the defendant, is sufficient to hold the defendant to bail. *Brownay and others, Exors. v. Deane*, 1 Pri. 402.

AFFIDAVITS ON MOTIONS AND RULES.

A palpable mistake in an affidavit, as the year in the jurat, used in support of an application to the court, is not an insurmountable objection to the motion, as the court will permit the error to be amended by a supplemental affidavit. *Ans. 12 Pri. 149.*

But where such negligence occurs, they will set it on the party in the consideration of the quantum of costs. S. C.

In the case of a revenue information, if the affidavit in support of a motion on the part of the defendant for postponing the trial on the ground of the absence of a material witness do not state either that the witness is abroad and out of the jurisdiction of the court, or where he is, or that the deponent does not know where he is to be found, the court will not entertain the application; but they will enforce the rule to give defendant an opportunity of renewing application on an amended affidavit supplying the omission of the necessary averments. *An. 13 Pri. Phillips*, 13 Pri. 522.

If the court opens a rule, made absolute on usual affidavit of service, to give an opportunity of shewing cause, they will not hear affidavits made after the day on which the rule had been made absolute. *Tripp v. Bellamy*, 5 Pri. 384.

If affidavits run to an impertinent and unnecessary length, the court will order the party filing them to pay a proportion of the costs. *Exp. Inhab. of Hamble*, 7 Pri. 594.

An affidavit made after rule nisi granted, is inadmissible in support of the rule. *Ditchett and others v. Tollett*, 3 Pri. 257.

When a rule is made absolute on payment by the applicant of the costs of the application, affidavits in opposition not read nor entered in the minutes, nor noticed in the order, will not be allowed taxation. *Rex v. Randall*, 5 Pri. 576.

Where affidavits contain irrelevant matter, they will direct the master to ascertain what parts are material to bring the question in dispute before the court, and in his taxation to allow costs to the parties filing the affidavits for such parts only as are material, and to the opposite party the costs occasioned by irrelevant matter. *Cussen, Gent. one, &c. v. B.*, 2 Y. & J. 631.

How sworn. An affidavit to ground a motion for a rule nisi, cannot be sworn before the attorney or his partner. And a rule obtained on such an affidavit was discharged with costs. *Batt v. Vaisey*, 1 Pri. 116.

The rule that affidavits to be used in court shall be sworn before the attorneys of the parties, was used to include the immediate attorney or solicitor to the party as well as the four attorneys of the court and its former constitution. *Cooper v. Archer*, 12 Pri. 16.

Where an affidavit has been sworn before the attorney's solicitor, it is necessary to have an affidavit to that fact; the court will not reject it, merely because it appears on the face of it to have been sworn before

on of the same name as the plaintiff's attorney. *nn v. Walker*, Wightw. 82.

merits.] To set aside a judgment on payment is, the affidavit must be of belief of "good decision on the merits." *Westerdale v. Kemp*, 1 Tyrw. S. P. *Bower v. Kemp*, 1 C. & J. 287.

avit that deponent believes the parties to have defence to the action, is sufficient without ad- "on the merits." *Doe d. Shaw v. Roe*, 13 Pr. Qu.

ut.] It is sufficient that all affidavits appear by the jurat to have been sworn by all the ents; and it is not necessary that they should erally named in the jurat as having been sworn, the King's Bench. *Anon.* 2 Pr. 1: but see *see and another v. Marsh*, 11 Pr. 609, and Reg. Trin. 1 G. 4. ante, p. iii. *Anon.* 1 Y. & J. 101. jurat of an affidavit which is to be read, must hat all the deponents have been sworn. *Ret v. s of London*, in *Parlett v. Barnett*, 1 Pr. 338.

AMENDMENT.

en the plaintiff's name is mistaken in the pond the pleadings, the Court will give leave to l while all is in paper. Qu. Whether such mer is a cause of nonsuit? *Gardner v. Walker*, t. 935.

Court refused, on cause shown, to discharge a ar rule, allowing the Attorney General to amend ormination for penalties incurred under the ex- ws, on payment of costs, as to ten new contrits had been added, charging other offences id vs long subsequent to those in the original in- tion, and to the filing of that proceeding, and ming of process thereon, and although the name succeeding Attorney General had been intro- ; and although the defendant was served with a on the first information, in Easter vacation, able the first day of Easter term: and the side- le for amending, was not obtained till the first l following Michaelmas term, nor the in- ion so amended filed till the seal day after elmas term. *Att. Gen. v. King*, 5 Pr. 368.

ere the appointments are made by the master order for the plaintiff to amend on payment of and the plaintiff's attorney attends the master lingly, but no one appears for defendant, the r should indorse the order, allowing the sum of l. for costs of the attendance, without requiring idavit of the service of the appointments, or of tendances. *Praed and others v. Hammond and* , 2 Y. & J. 32.

ter rule for new trial granted.] Where a rule new trial, obtained on the ground that an alle- i in the declaration had not been sustained by roof offered to support it (*vide ante* p. 686) can made absolute, the Court allowed the plain- amend the declaration to that stage of the pos- s, by so framing the allegation as to avoid the ice. *Hooper v. Mantle*, 13 Pr. 436: but see case.

ey refused to impose on the plaintiff, as terms, ayment of the costs of the former trial, making le absolute on the usual terms of paying the of the amendment, and of the application for — on the ground that the allegation was not so ial to the question of merits as to make an im- nt, if any substantial variation from the proof, be cause had been sent down, that the question en the parties might be determined, and not on round of the declaration. Costs of former trial ide the event. S. C.

ter verdict for plaintiff, and rule made absolute i new trial, defendant will not be allowed to id the pleadings by withdrawing the general issue

and pleading a special justification. *Chambers v. Bernasconi and others*, 1 Tyr. 344.

AMERCIAMENTS. See Fines, &c.

ANNUITY.

A clause of redemption contained in the body of an annuity deed, must be inserted in the memorial; but the Court can only set aside the warrant of attorney and the judgment, and cannot proceed on motion to order the securities to be delivered up for this omission. *Appleby v. Smith*, 3 Anst. 865.

APPEARANCE.

Compelling by distringas. See DISTINGAS.

A waiver of irregularity in process by appearance does not relate back so as to bring defendant into contempt for not appearing in time. *Robinson v. Nash*, 1 Anst. 76.

Where the solicitor for a defendant sued jointly with his wife for a debt due from her *dum sola*, appears on his undertaking, and pleads for the husband only — the plaintiff (having caused the wife to be served with a copy of the process) may appear for her *secundum statutum*, and treating the plea so put in by the husband alone as a nullity, may sign judgment for want of plea. *Russell v. Buchanan*, 6 Pr. 139.

Appearances in court in person in a suit in the king's remembrancer's office, may be recorded in court without fee, to a clerk in court. *Att. Gen. v. Carpenter*, 1 Tyr. 280. 1 C. & J. 289. S. C.

An attorney having once entered an appearance for a party, cannot strike it out without motion for leave. *Menzies v. Rodrigues and others*, 1 Pr. 92.

APPRAISEMENT.

Writ of.] It is not necessarily essential to, as order of the commissioners of customs, made to restore goods seized, that any terms or conditions should be imposed on the proprietors by the order, and the court will not refuse to stay proceedings on a writ of appraisement on that ground, although the application proceed from the crown: but they will not quash the writ if regularly issued. *In re Ship Maria, &c.* 1 Pr. 4.

ARBITRATION AND AWARD.

Revoking submission.] A submission to arbitration by a baren's order is revocable until the order is made a rule of court. *Greenwood v. Misdale*, M'Clel. & Y. 376.

A revocation of a submission to arbitration not under seal, before award made, is, in effect, a breach of an agreement to stand to, obey, abide, perform, see, and award, for which recompit will lie; and the plaintiff may declare, that the defendant had not performed the agreement, and not, to revoke the submission, and lay the revocation as a breach. *Brown v. Tannery*, M'Clel. & Y. 464.

Enlarging time for making award.] The time for making an award was enlarged by the parties altering and re-executing the arbitration bonds, and the arbitrator awarded interest on a principal sum found to be due from the one to the other, beyond the date of the original submission, but within that of the re-execution: Held, that he had authority so to do, for that the date of the submission had been extended to the time of re-executing the bonds. *Watkins v. Phillips*, M'Clel. & Y. 393.

Whether an award of interest, on a sum due on securities carrying interest beyond the submission, and till payment, be good. Qu. S. C.

Questions on awards not to be heard on the last day of term. S. C.

An objection that the time for making an award has not been duly enlarged, is waived by proceedings in the reference with a knowledge of that fact. *Lawrence v. Hodgson and Others*, 1 Y. & J. 16.

Costs of reference.] Where, in three actions brought by the same plaintiff against the same defendant, and referred to arbitration, the costs of the reference were awarded to be equally borne by the parties; and the master on taxation, allowed the defendant, as costs of reference, two distinct sums for the attendance, loss of time, and travelling expenses of the same witnesses, in two different actions; and made no allowance to the plaintiff for a sum sworn to have been paid by him to the arbitrator as costs of the reference; a rule nisi for reviewing the taxation was discharged without costs—it not being alleged that the two former sums were allowed for attendance, &c. in one day; the latter sum not appearing in the plaintiff's bill, produced before the master; and no objection having been made at the taxation. *Utting v. Evans*, M'Clel. 12.

Umpire and arbitrators cannot make detached awards.] Under a submission to arbitrators, to arbitrate and determine concerning all controversies and demands, &c. so as the award should be made by the 1st of June; but if the arbitrators should not make their award of and concerning the premises by that time, the matters to be referred to an umpire, to be chosen by the arbitrators between the said parties of and concerning the premises, &c. (as before) so as, &c. (as before) the umpire should make his umpirage by the 8th of June;—the arbitrators met and determined upon five matters, and referred a further remaining question to an umpire, whom they stated in the indorsement on the arbitration bond, they had chosen to decide between themselves. The arbitrator and umpire afterwards made an award, reciting that the arbitrators could not agree on one point, which, therefore, they had referred to the umpire, who stated that he determined it as follows, &c. Held, on a motion for a new trial, of an action of debt on the arbitration bond (the plaintiff having been nonsuited), that the award was bad, the arbitrators and umpire not being authorized by the terms of the submission to make the award in a detached manner as they had done. *Tollit v. Saunders*, 9 Pri. 612.

Plea of arbitrament.] Arbitrament without performance is a good plea, where the parties have mutual remedies. *Gascyne v. Edwards and another*, 1 Y. & J. 19. See *Allen v. Milner*, Mich. 1831. 2 Tyr. R.

Attachment to enforce award.] Where a demand of money under an award, with a view to a motion for an attachment, has been made by a person authorized by letter of attorney, the authority must be shown to the party at the time, and it must appear on the affidavit filed in support of the application. If the arbitrator, under a reference by rule of court on a baron's order made before the cause be at issue, do not award a certain sum of money, and require that the party pay the sum awarded, but direct a verdict to be entered for a certain sum for damages, an attachment cannot be granted on it; for it cannot be taken to be an award of so much money; rejecting the direction to enter a verdict. *Jackson and others v. Clarke*, 13 Pri. 208.

A rule to show cause why an attachment should not be granted, was, under such circumstances, discharged with costs. S. C.

The affidavits to ground a rule nisi for an attachment against the defendant, for non-payment of money and costs pursuant to an award, and the master's certificate, where the demand has been made by a third person, should state that the original power of attorney was shown to the defendant at the time

of the demand being made. *Jackson v. Clark*, M'Clel. 72.

A rule for an attachment for non-payment of cost pursuant to an award made under a rule of court, and the master's allocatur must be a rule to show cause. The affidavit upon which such a rule is obtained, must state the due execution of the writ: the service of a copy of the award of the arbitrator on the defendant; the due execution of the letter of attorney; and a demand of the costs, and rule to pay. *Gifford v. Gifford*, Forrest. 80.: but in next case.

The party deputed by power of attorney to receive payment of a sum awarded, must not only show the letter of attorney to the party, but must produce a copy thereof. *Laugher v. Laugher*, 1 Tyr. 332. *Broderick v. Teed*, 1 Pri. 401.

Setting aside award.] An award will not be set aside upon any ground, which in truth is a question of the merits between the parties. *Winter v. Littlewood Bart.*, M'Clel. 223. S. C. 13 Pri. 533.

An arbitrator, in regulating the future of a stream of water, the right to which was divided between the parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, and was not a material difference, and which joined the first: held, that he had a power to do so, incidental to, and resulting from his former direct and larger power. S. C.

If an arbitrator, after regulating on the same matter referred to him in its present state, and regulates prospectively on the same subject-matter, reduced to a different state, and thereby the degree altered, *quære*, whether that be a proceeding beyond his authority? Though the award be valid in that respect, yet that does not vitiate those which are otherwise unobjectionable; and it must stand *in toto*, until the particular contingency on which the prospective regulation applies. S. C.

Setting aside for uncertainty.] An award that A. or B. shall do a certain act, is bad for uncertainty. *Lawrence v. Hodgson and Others*, 1 Y. & J. 14.

If a cause come on for trial and be referred to the arbitrator's award in favour of the plaintiff, and be afterwards set aside, so that the cause be again in sequence subsequently tried, the plaintiff, if he should also succeed on that occasion, will be allowed the costs of the former trial. *Foot v. Sedgwick*, 1 Pri. 316.

No objection can be taken to an award, on the ground of a mistake in point of law, unless the grounds of the objection appear upon the award, in some authentic shape before the Court. *Jones*, 2 Y. & J. 114.

The court requires strong facts, and directs, in order to set aside an award, and is not of any such is conclusive. All the witnesses of the party against whom the award is made, must be examined, and in his presence, or it will be no ground for setting the award aside: but that must be made clearly to appear. *Quæ*, if it be not necessary to show that such examination was, in point of law, required, or whether a witness, having been examined, as to be examined, be not a requisition. *Reed v. Southall*, 4 Pri. 232.

A refusal by the court to enforce an award, an attachment does not decide on the validity of the award, considered as the subject of an attachment. But where an arbitrator, to whom a cause was referred being at issue, was referred by rule of court on motion, awarded thus: "I award and direct that a verdict in this cause be finally entered for the plaintiff, with 284l. 12s. damages." Held, that he had exceeded his authority in directing the entry of a verdict, and that, as the award consisted of costs

ce, that direction could not be rejected, and the award considered as an award, that so much was not to be paid; and, that, therefore, the award not be supported either by attachment or action, that at whatever stage of proceeding a cause was arrived, an arbitrator can have no authority self, and without the intervention of a jury, to the entry of a verdict. *Jackson and others v. McClell. & Y.* 200.

arbitrator to whom a cause was referred from issue, found that the plaintiff was entitled to a way for carriages, which he had at first claimed his declaration, but afterwards abandoned. as held to be an excess of jurisdiction, and the way was set aside *pro tanto*. In a second action in the same parties, for obstructing a way, the of a judgment for the plaintiff in the first upon a plea of not guilty, when given in evidence under the same plea, is not conclusive as to the defendant's right, so as to preclude the defendant from entering into the case. *Hooper v. Hooper, McClell. & Y.* 9.

acts in award, how far defence to action on it.] objection to an award, that the arbitrator has determined any of the matters submitted to him (fatal) cannot be taken advantage of upon a plea to a declaration in debt on the award, unless it appears on the face of the submission. *Aitchison v. B.* 13 Pri. 639.

be the fact, it should be put on the record by the arbitrator with sufficient averments to raise the objection.

an arbitrator exceed his authority in going beyond the terms of the submission, to direct the mode of doing any of the matters ordered by the award is alone, that direction may be rejected as a mere surplusage, forming no part of, and consequently not binding upon the award, which will be still good, and the award may still be enforced. S. C. *rimd facie* uncertainty, or want of conclusiveness in an award, does not vitiate, if it be capable of being rendered certain or conclusive: and the award is good or bad according to the event. S. C.

ARREST.

[*privilege from*.] G being a party in the suit referred to arbitration, having been also required to attend Exeter as a witness before the arbitrator, and taking with him certain papers in his possession, and on the reference, which was appointed on the 1st of September, left London on the 16th for the purpose of going thither, and pursued his journey by way of Clifton in order to procure the necessary papers which had been left there during the previous custody of his wife, who had continued and remained there, and arriving on the 17th, he employed himself in sorting his papers, and selecting such as were necessary to take with him, which he sent him and the professional person whom he desired to accompany him to assist in so doing, the day and the next; and at five o'clock of the day, and whilst he was so busied, he was arrested at the suit of a creditor: Held, that he was not guilty during the journey, including his stay at Clifton, on the ground of the deviation being for a lawful purpose, and the delay no more than reasonable for the accomplishment of it, according to the practice of the court by the affidavits. *Garrow v. B.* dissentiente; *Richards, Lord Chief Baron, B.* *Beckett and others v. Gurney*, 7 Price, 9.

defendant arrested by *quo minus* while protected by the privilege of C. P. as a suitor there, may be discharged on common bail by either court. *Walker v. B.* 3 Anst. 941.

[*charge from*.] Where a defendant was seized

on a Sunday, detained till next morning, and then arrested on a *quo minus*, held that the arrest was void, and could not be made good, even by a subsequent consent on certain conditions. *Lyford v. Tyrrell*, 1 Anst. 85.

The court will not order a defendant, arrested in trover, to be discharged on filing common bail, on motion for that purpose, founded on an objection to the form of the affidavit on which the process issued, that it did not negative a tender; although the motion be made on an affidavit, stating that the value of the subject-matter of the action had been, in point of fact, actually tendered to the plaintiffs before the writ was sued out. *Anon.* 4 Price, 366.

Affidavit that the cause of action arose in Ireland, and that defendant had since been found a bankrupt there, and obtained his certificate there, held insufficient for discharging defendant on common bail. *Anon.* 1 Anst. 80.

Semb. the effect of a certificate in Ireland should have been stated. S. C.

A arrests B in breach of good faith, on five promissory notes of 100*l.* each, but discharges him out of custody on terms, one of which is the payment of two of the notes. A afterwards serves B with serviceable process for the balance, but does not file a declaration; and eventually endorses the three remaining notes which are over-due, to C, who takes them without enquiry. C holds B to bail. B held entitled to be discharged out of custody, as to the last action, on entering a common appearance; but not to a stay of proceedings, until the two former actions were discontinued. *McClure v. Pringle, McClell.* 2.

[*Malicious*.] Where the plaintiff does not recover the sum for which he held defendant to bail, and the arrest can be shown to be malicious, defendant may proceed at common law. *Weaver and another v. Birdall*, 12 Price, 734.

[*Second arrest*.] A arrested B and died. A's executors again arrested B for the same cause of action: Held, that the second proceeding was not vexatious, and that the defendant was not entitled to be discharged out of custody on entering a common appearance. *Mellin and others, Exors. v. Evans*, 1 C. & J. 83.

ARREST OF JUDGMENT.

A rule will be granted in arrest of judgment after a rule for a nonsuit is discharged. *Lumby v. All-day*, 1 Tyr. 217.

On Issue from Court of Equity, see *Issue*, &c. A motion cannot be made in arrest of judgment on a *seire facias* after the first four days of term. *Rees v. Macleod*, 3 Price, 203.

Matters of fact not appearing on the record, cannot be called in aid, in opposition to a motion in arrest of judgment, on objections apparent on the face of the record. *The King v. Ramsbottom and others*, 5 Price, 447.

The Court will not, after verdict, arrest a judgment on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial. *Att. Gen. v. Woodhead*, 2 Price, 3.

Nor does it seem that a conviction would be sufficient ground for sending a cause back to jury for re-investigation. S. C.

[*Costs*.] Where the plaintiff obtained a verdict, and the Exchequer arrested the judgment, which judgment was reversed by the Court of Exchequer chamber: Held, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officers of the Court of Exchequer. *Adams v. Meredith*, 3 Y. & J. 419.

ASSESSED TAXES. See *TAXES*, *ASSESSED*.

ATTACHMENT.

Attachment for non-payment of costs will be granted, though order nisi for payment not personally served. *Qu.?* *Merritt v. Meek*, 3 Aust. 656.

On motion for an attachment for not paying money under a previous order of the court, on a party who has been called on by the former rule to show cause why that money and the costs of such application should not be paid, and against which order no cause has been shown; the rule for the attachment will be granted absolutely in the first instance. *King v. Price*, 1 Pri. 341.

Order of the court that a defendant pay a certain sum of money, being shown to the defendant at the time of making a personal demand of it, a copy of such order not having been personally served on the defendant himself (although a copy had been previously served on his attorney), not sufficient to entitle the plaintiff to an attachment. *Broderick v. Teed*, 1 Pri. 401. See *Laugher v. Laugher*, 1 Tyr. 352.

Where a defendant has been arrested on an attachment for contempt in not appearing to a *subpoena ad respondendum*, the court will not grant a motion for a messenger to bring up the body, if he have given a bail bond to the sheriff, because plaintiff has a remedy on the bail bond, although the penalty (40*l.*) be, in almost all instances, very inadequate to the occasion, if the condition should be broken. *Birdwood v. Hart and another*, 6 Pri. 32.

If there be an injunction restraining further proceedings in the action, the plaintiff should apply to the court, under the particular circumstances, to be permitted to sue on the bail-bond, notwithstanding the injunction, where the defendant has not complied with the condition by appearing. S. C.

Discharge.] The court refused a motion for the discharge of a defendant from custody under an attachment for contempt in not producing deeds, papers, &c. before the Master, on an affidavit that the defendant has not, nor ever had, any such in his possession, or within his power. *Hurd v. Perrington and others*, 12 Pri. 689.

The course is, to leave an affidavit of the fact in the Master's office, when, on obtaining his certificate, the defendant will be discharged as a matter of course. It was made part of the terms of a subsequent successful application for the defendant's discharge, that he should pay the costs of that application and of the previous irregular motion. S. C.

ATTORNEY.

Lien for costs. See RELEASE.

Undertaking.] An attorney's undertaking to pay his client's debt and costs in an action will be enforced on motion in the court of which he is an attorney, though the undertaking be void by the statute of frauds 29 C. 2. *Evans, excentrix. v. Duncan and another*, 1 Tyr. 283. 1 C. & J. 372. S. C.

Semble, the summary jurisdiction of the Court of Exchequer reaches an attorney of another court, who practised there in the name of a side clerk. S. C.

Changing.] A rule to shew cause why an attachment should not issue against the former attorneys of a defendant, in a cause for not delivering their bill of costs to the defendant's new attorneys, pursuant to a Baron's order, discharged, the bill having been delivered since the rule was served on the parties, and illness having been assigned in the affidavit as the cause of the parties not obeying the order, the rule was discharged without costs. *Gripper v. Cole*, 11 Pri. 693.

Such an order is not of a peremptory nature, is absolute in the first instance. S. C.

Attachment against.] An attachment was taken absolutely in the first instance against an attorney for non-payment of money, pursuant to an order, another attorney of the party for whom the firm had been changed by order of the court, and that though in the orders for changing the attorney, as for payment of the money, he had been called *John* whereas his name was James, but he had made several summonses taken out as against *John*, and had consented to some of them without objecting to a misnomer, which the court thought under the circumstances cured the mistake. *Stevenson, Ex. v. Power*, 9 Pri. 384.

Bill.] Where the solicitor was guilty of gross delay in bringing in his bills, the court will not give him his costs of taxation though less than one-fourth part is taken off. *Yes v. Yes*, 2 Aust. 589.

An attorney cannot set off his bill without having delivered it. *Murphy v. Cunningham*, *Grat.* 180 198.

A plaintiff and defendant settled an action in which the defendant giving a bill for 24*l.*, 1*9s.* and being for the debt, and 5*l.* for the costs, which however nearly amounted to 24*l.* Plaintiff's attorney was not party to this arrangement. A bill being deposited in the hands of a third party was ordered to be delivered up to plaintiff, and in satisfaction of his costs. *Gould v. Davis*, 1 Tr. 2.

The court will not stay the process in the hands of an associate, for the purpose of having an attorney's bill on which an action had been brought and a verdict covered, referred for taxation and to be indorsed and sent to the allocatur, where the jury expressly found "verdict for the plaintiff for the amount of his bill subject to taxation." They discharged a rule which had been obtained to shew cause why such an application should not be granted with costs. *Hewitt, Gent. v. Selley*, 7 Pri. 234.

Where B being desirous of raising a sum of money on mortgage, employed an attorney for the purpose who applied to A an attorney, telling him that he was of his principal, and A agreed to advance the money on behalf of a client, but ultimately the request failed from defect of title: Held that A could not sue B for his fees, though it was proved to be the practice for the proposed borrower to pay the expenses of the proposed lender, the course being that the attorney of the latter to send his bill to the attorney of the former, who, if the bill was reasonable, recommended his client to pay it. *Rigley, Gent. v. Deyskin*, 2 Y. & J. 83.

In disposing of a rule nisi obtained on one of other grounds, the court will not give an opinion on the alleged unreasonableness of an attorney's bill, stated as the sole ground for supporting the rule, that being a proper subject of reference to the Master; nor will they make such a reference as to the order for discharging the original rule. *Robertson, M'Cl. & Y.* 105.

Bill—costs of taxing.] On the taxation of a deceased attorney's bill, in an action brought by executors (who had acted improperly in some respects) instead of his surviving partner, the court having deducted less, but having allowed credit for a sum which with the deduction, amounted to less than a sixth; the court left each party to pay its own costs of the taxation. *Gale, Excentrix. v. Kingston, Bart.*, M'Cl. & Y. 354.

The court cannot order a solicitor's bill of costs in a business done wholly in the House of Lords in the prosecution of an appeal, to be referred to the Master because their officer has no means whereby he can be enabled to tax such a bill. *Williams, Excentrix. v. Williams*, 4 Pri. 279.

BAIL.

[the sheriff.] A sheriff is not authorised by 6. c. 10, to let out of custody on bail, a defendant under an attachment issuing out of a court of law for non-payment of costs, because such process is in the nature of, and in effect is an execution.

Plea to an action of debt on such a bail-bond, it was given to the sheriff under such circumstances, held good on general demurrer. *Phelps v. St. 4 Pri. 22.*

[charge on filing common bail.] If there be ground to suspect that the securities upon which defendant is held to bail are illegal, the court will require him upon filing common bail. *Wightwick v. Forr. 153.*

[above—Who may be.] One of bail being sworn clerk to an attorney, rejected. *Stoncham v. Pink, 363.* See *Mann v. Nottage, 1 Y. & J. 367.* attorney's clerk may be bail for his master. *v. Edwards, 2 Anst. 356.*

[sekeeper.] A person occupying a house for a period, for which he pays neither rent nor admissible to justify as special bail. *Williams v. Hick, 2 Pri. 8.*

[reption.] See *Reg. Gen. Trin. Term, 1831, APPENDIX No. I. tit. BAIL.*

[reption of bail as of his place of business sufficient.] *Tanner v. Nush, 1 Pri. 400.*

[a general description of bail, although a sufficient ground for opposing the justification, is not in enough to call upon the court to fix the debt with the costs of the opposition at the time, consideration of costs will be reserved till the try.] *Richardson v. Hodgson, 11 Pri. 379.*

[of bail.] Requisites of notice of bail where sheriff justify as bail above. *Anon. 1 Tyr. 378.* *Reg. Gen. Trin. Term, 1831, ante, APPENDIX tit. BAIL.*

[ber.] Where the sum sworn to is large, the court will permit more than two bail to be put in. *Let v. Kroger, Wightw. 110.*

[re than two persons are meant to be tendered to a large amount, leave should be first asked to permit them to justify, for they will be allowed to do so, on motion merely, in the course.] *Anonymous, 13 Pri. 448.*

[bail admitted to justify.] *Whitwick v. Pick- 138.*

[and when put in.] Where bail have been by a defendant and not perfected, the sheriff's day put in and justify bail for his own indemnity. *Peacock and another, 5 Pri. 558.*

[g.] Bail must be added before the two days of justification is given, notice of adding and cannot be given at once. *Anon. 2 Anst. but see now Reg. Gen. Trin. 1831, ante.*

[re of.] Where a recognizance of bail is put in suit here, the plaintiff cannot have advantage which he would not have had by the C. P. *Vincent v. Brady, 1 Anst. 47.*

[of recognizance.] In Exchequer, the form of process of bail after judgment, and before debarment has been charged in execution, is to render to the Fleet, on or before the 4th day of the following term. *Bottomley v. Medhurst and McCle. 310.*

[a case where that condition had not been complied with, the Court refused an application made with a view of relieving the bail, to amend the record of recognizance entered in the above form, on affidavit it had been taken in a different form; viz. to render.] But the bail were thereby not precluded from obtaining relief by a different application. *S. C. v. person.] It is sufficient if bail swear they are worth the amount required after paying all their just debts. Anon. 2 Y. & J. 101.*

An affidavit of the acknowledgment of bail is properly sworn before a commissioner for the purpose of taking bail. *S. C.*

[Justification.] Exchequer will permit a justification of bail where the title of the cause is not correctly set out in the bail-piece. *Calvert v. Botcher and Another, 1 Pri. 385.* *Q. B. 1831, 1832.*

[Property abroad is not a sufficient qualification to justify on bail.] *Whitwick v. Pickering, Forr. 138.*

[It is no objection to the justification of bail, that the bail accepted by one clerk in Court and the notice of justification sent of added bail given by another, if the latter are added by the bail to the sheriff.] *Hancock v. Green, 1 Y. & J. 456.*

[Bail not allowed to justify, where the notice of justification was signed by a person describing himself as the defendant's agent, not being an attorney of this Court, or a clerk in Court.] *Walker, gent. v. Rushbury, gent., 9 Pri. 148.*

[Justifying at chambers.] The Court will now give time to justify bail at chambers. *Bell and Others v. Horton, 11 Pri. 741.*

[Justification of bail at chambers in vacation without consent, held not good; but plaintiff not objecting to an application to the Court to permit such justification, considered tantamount to consent.] *Sayers v. Tol-free, 1 Pri. 2.*

See *Reg. Gen. tit. BAIL.*

[Justifying by affidavit.] Where persons who are shown to be bail in other actions, justify as bail by affidavit, they must swear that they are worth the sum required beyond what will satisfy their debts and other engagements. *Henshaw v. Woolwich, 1 C. & J. 150.*

The affidavit by bail in the country of competency to justify, should state them to be worth double the sum sworn to, over and above all their debts generally. *Senior, Administrator, &c. v. Speight, in re Bail, 12 Pri. 393.*

If it have the words "just debts," it will be considered insufficient. *S. C.*

But time will be given, in such a case, to frame another affidavit. *S. C.*

A bail by affidavit rejected on affidavit that he had dishonoured a note over-due, no reason for so doing being stated on his behalf. *Cross v. Williams, 1 Tyr. 531.*

If it appear from the affidavit to oppose the justification of bail, that the person offering himself for that purpose has ceased to be actually a housekeeper, although he occupied a house when he signed the bail-piece, and is about to occupy another, he is not admissible. *Weale and Others v. Wild, 12 Pri. 770.*

Bail (by affidavit) rejected, because the name of each deponent was not inserted in the jurat of the affidavit. *Wellings and Another v. Marsh, 11 Pri. 509.*

A defendant usually residing in the country, arrested in London in a town cause, may justify bail by affidavit. *White v. Thomas, 5 Pri. 13.*

An affidavit of justification of bail, in the jurat of which it was stated to have been "sworn at Beverley," (omitting the county) rejected. *Boyd v. Shaker, 7 Pri. 662.*

The affidavit of justification of country bail, ought to be taken before the bail commissioner, and the affidavit of caption before a commissioner for taking affidavits (or the baron to whom the bail shall be transmitted). *Salmon's Bail, M'Cle. & Y. 149.*

[Costs of opposition.] By practice of Exchequer, the plaintiff is entitled to costs upon the second notice of justification, if a brief has been delivered to counsel to oppose the bail on the first notice. *Barrow v. Whitehead, 2 Y. & J. 2.*

The costs of one successful opposition to bail (5*l.*) must be paid before other bail can justify. *Smith v. Cooper, a Prisoner, 1 Tyr. 378.*

Render.] Surrender of the principal by bail below after bail above put in, but not forfeited, though before assignment of the bail-bond, does not discharge the bail to the sheriff after the return of the writ. *Turner v. Wheatly*, 1 Pri. 262.

A defendant may be rendered during the whole of the day on which the rule to bring in the body expires. *The King v. The Sheriffs of London*, in a case of *Parlett v. Barnett*, 1 Pri. 338.

The render is not complete or effectual till notice served. S. C.

The Court will set aside an attachment against the sheriff on payment of costs, if the defendant has been rendered on the evening of the last day of the rule, and notice be given next morning. S. C.

Time enlarged for bail rendering their principal till a week after the expiration of the term of his imprisonment in the county gaol of D., under conviction and sentence for a misdemeanour. *Ashmore v. Fletcher*, M'Cl. 252.

Where the defendant put in bail and pleaded in abatement, but afterwards exception having been taken to the bail, gave notice of adding and justifying fresh bail, and subsequently rendered in due time: Held, that the render was equivalent to a justification of the bail, and that the plea was well pleaded. *Cassen, gent., one, &c., v. Bond*, 2 Y. & J. 531.

Where a defendant, who had been arrested and delivered to bail in a civil action commenced in the Exchequer, was confined in a county gaol, under sentence six of months' imprisonment by a criminal court, for a misdemeanour of which he had been since convicted, this Court, on motion on the part of his bail, enlarged the time for rendering their principal until within a given period after the expiration of his imprisonment. *Ashmore v. Fletcher*, 13 Pri. 523.

The Court made absolute a rule granted to shew cause why that should not be done, on payment of costs. S. C.

Bail are not allowed four days to surrender their principal after the determination of a writ of error, where the plaintiff has proceeded by subpoena, and error is brought before the *ca. sa.* *Rolfe and Another v. Cheetham*, Wightw. 79.

Where persons who had become bail for a defendant surrendered to prison in discharge of his bail in the action, by entering into the usual recognizance required after judgment, for satisfying the condemnation, or rendering the body of the principal on or before the 4th day of the next term, or their bodies, lands, and goods should be liable to satisfy the condemnation, had not rendered the party within the time, on the ground that the defendant having in the mean while obtained his certificate under the bankrupt act (which, though signed by the commissioners, was not, for want of the chancellor's allowance and signature, sufficient in point of form to warrant the discharge, until the 12th day of the term, within the first four days of which the defendant should have been rendered by the bail): the Court held, that as it was now the modern course of practice to indulge bail to the action, if they have acted *bond fide*, they might, in a case of such circumstances, on the same principle, extend the same indulgence to persons becoming bail after judgment for a defendant in custody; and therefore, granted an application on the part of the bail for staying all proceedings in an action brought against them on their recognizance, founded on their not having rendered the defendant according to the terms of their engagement, and for entering an *exoneretur* on the bail-piece, on payment of the costs of the action, and of the application.

It is not necessary, for the purpose of such a motion, that the party should be actually rendered into custody before it can be entertained by the Court. *Bottomley*

v. Medhurst and Another, 13 Pri. 709. S. C. M'Cl. 399.

If an action be brought in this Court against bail, upon their recognizance of bail entered into in the King's Bench, they must render their principal as if the recognizance had been taken in this Court. *Dabins v. Taylor*, 1 Y. & J. 15.

The bail have only four days to render their principal by the practice of this Court, after the return of the writ, although there be not so many days remaining in the term. S. C.

In proceeding by subpoena against bail on the return of *ca. sa.* in this Court, the bail have only four days after the return of the writ, in which to render their principal. *Waring v. Jervis*, 5 Pri. 171.

Where the writ was returnable on the last day of term, and the bail had been unable to render the defendant, from the dangerous state of his health, within the four days, the Court refused, on their application, after the expiration of the four days, to allow them to render the principal on that ground, in consideration of the shortness of the time allowed by that particular mode of proceeding, as abridging the usual time allowed in the other Courts, and even in this Court, by its ordinary process of *quo minus*. *Quære*, if the application had been made before the expiration of the four days' notice? S. C.

Rendering after error brought.] If, pending proceedings against bail, a writ of error be allowed, the bail's application to the Court, will be given the same time to surrender the principal, after judgment affirmed on writ of error non-prossed, as they would have had at the time the writ of error was allowed, and in the mean time the proceedings against the bail will be stayed. And that application will be granted, where the writ of error was allowed two days after the return of the writ *ad resp.* against the bail, and the motion not made five days after (the fourth day being Sunday). *Nett v. Forester*, 2 Pri. 296.

Bail in error.] Bail in error is not necessary by 3 J. 1. c. 8. and 2 C. 1. c. 4. s. 4. in debt on bond conditioned for reinvesting stock, and paying the dividends in the mean time. *Gillingham v. Wall Myers*, M'Cl. & Y. 147.

BAIL-BOND.

Assignment and proceedings on.] When bail below become bail above, and do not justify on bond excepted to, the plaintiff cannot take an assignment of the bail-bond. *Bubb v. Barber*, Anst. 274.

An attachment against the sheriff having been made, the plaintiff is at liberty to proceed on the bail-bond. *Brown v. Neave*, Wightw. 406.

Stat. 4 Ann. c. 16. does not affect the action on bail-bond, when brought by the sheriff, and he may sue on it in any court, and is not restricted to the court in which the original action was brought; and therefore on a general demurrer to an action by the sheriff on a bail-bond forfeited, on the ground that the action was brought by the declaration to have been brought in a different court from that out of which the original process issued, the court gave judgment for the plaintiff. *Yorke v. Ogden and another*, 8 Pri. 11.

Staying proceedings on. — Cancelling &c.] An action is not lost unless judgment of the term is lost by the defendant's delaying to put in and perfect bail in due time. Proceedings on a bail-bond were stayed where the bail put in and justified on the usual terms of the bail-bond standing as a security, where the bail being returnable the last day of one term, the bail might have been in the first sittings in the next term, had been put in in due time. *Feran v. Knight*, 11 Pri. 420.

In a country cause, where the plaintiff has been put to trial, the court will not stay proceedings upon a bail

d, unless upon the terms of its standing as a security. *Fillis v. Stabb*, 1 Y. & J. 373.

Where an opportunity of going to trial has not been or if judgment could not have been obtained before the term in which the motion be made, the court not require it to be made part of the order for staying proceedings, that the bail-bond shall stand as a rule. *Semble aliter*, if a trial have been lost. *deu v. Blackie*, 13 Pri. 114.

The court will stay proceedings on an assignment of bail-bond, the defendant having since perfected on motion, without tender of payment of costs, or affidavit of merits, or that the application is made to the sheriff or bail, where a trial has not been nor will they in such case order the bail-bond to stand as a security: requiring only that the plaintiff be put in the same situation as if bail had been given in time, and duly perfected. *Searle, assignee v. Sheriff of London v. Hale and others*, 3 Pri. 52.

There is no rule of court in Exchequer, as in the K.B. application by bail for a rule to stay proceedings on assigned bail-bond, should be grounded on affidavit, the application is *bond fide* made on behalf or in the name of the sheriff, or on the part of the bail, and without exence, for their only indemnity, and without collusion with or indemnity from the original defendant; and a rule nisi for the above purpose, not based on such an affidavit, was made absolute. *ten v. Blakie*, 13 Pri. 114. M'Cl. 44. S. C. An affidavit of that nature, and of merits, is usual practice. S. C. And see *Crosby v. Davis*, 1 Tyr. n.

The court refused to order a bail-bond, on which proceedings had been stayed by order on perfecting to stand as a security, although the plaintiff had trial, where the defendant had previously made tender to the plaintiff after assignment of the bail-bond and proceedings had in consequence of not perfecting bail in time—to justify at chambers, to pay costs of the proceedings on the bond, to plead declaration, and take short notice of trial for next assizes, to which the plaintiff refused to attend; so that he lost the opportunity of going to trial through his own conduct. A rule to shew cause in order made at chambers, for staying proceedings should not be amended, by adding such terms, urged with costs. *Walker v. Mapowder*, 8 Pri. 610. Where an assignment of the bail-bond is taken, bail above have been put in, but not perfected, the plaintiff's clerk in court has consented to an order for staying proceedings on the bail-bond on payment of costs, he is not entitled to have the security of the bail-bond, because he has waived the right arising from having lost a trial by his own conduct. *Blure v. Mottram*, 9 Pri. 535.

Proceedings against bail below will be stayed on a rule (on payment of costs,) where the plaintiff in a civil action has been neglectful in proceeding against them on the bond as early as he might have done, even where a trial has been lost, if there has been no application on the part of the bail to think that the plaintiff did not mean to proceed in the action; such as the neglect of the defendant. *Duchett v. Tolleit*, 257.

The bail-bond will be ordered to stand as a rule, if the bail have not applied to stay the proceedings on the earliest opportunity. S. C.

A plaintiff may sue out a *quo minus* after having obtained common process for the same cause; and the court will not order the bail-bond in the second process to be delivered up to be cancelled, because there is only one warrant for both processes. *Lee v. Loug*, 12 W. 72.

Where a plaintiff had proceeded on an assignment of bail-bond taken after the render of the defendant's plea had put in bail, whom he had insufficiently

described, so that time was necessarily given for furnishing a better description, during which interval such further description was not given, nor was any attempt afterwards made to justify, the court set aside the proceedings on the assignment of the bond. It is not necessary in this court to produce an affidavit in support of such an application, that it is made *bond fide*, and on behalf of the bail, there being no rule in this court requiring such an affidavit to be made. Costs ordered to abide the event as costs in the cause. *Richardson v. Hodgson*, 11 Pri. 633.

Rule for staying proceedings on an assignment of a bail bond which had been obtained upon the application of one of the bail stating by affidavit an engagement between himself and the plaintiff to absolve him from his obligation, on payment of a sum of money at a future day, on the ground of a breach of good faith in proceeding against him before the time, notwithstanding the agreement, discharged with costs, upon a distinct denial (by affidavit) of the making of the agreement as stated. *Sweeting v. Weaver*, 11 Pri. 734.

The court will stay the proceedings against the bail, where the principal has rendered, on terms. *Standen v. Blakie*, 13 Pri. 114.

The Court will not stay proceedings upon a bail-bond, upon the ground that the affidavit upon which the bail above were rejected was founded on perjury, except upon the usual terms of paying the costs incurred by the assignment and subsequent proceedings. *Hobbs v. Miller*, 1 Y. & J. 403.

Where an attorney has become bail to the sheriff, and the bail-bond has been assigned, the court will upon the usual affidavit stay proceedings upon the bail-bond upon payment of costs. *Mann v. Nottage and another*, 1 Y. & J. 367.

Where a writ of *ca. sa.* was properly indorsed, and lodged, and had remained the full time on the file of the Sheriff of Middlesex's office, but there was no entry in the public book except of the day of its return, the Court refused to set aside the proceedings against the bail, no inquiry having been made at the office on their part, during the four days preceding the return, and it being sworn (although not by any person in the office) that if inquiry had been made, verbal information would have been given that the writ was lodged. *Smith and others v. Parker and another*, M'Cl. & Y. 483.

Where a rule to plead to an *alias sci. fa.* was given for the 3d instead of the 8th of Feb., but judgment against the bail was not signed till the 19th, the court, considering this a clerical error, sustained the proceedings. (Hullock, B. dissenting.) S. C.

Proceedings stayed in an action against bail, who had neglected to render their principal, a certificated bankrupt; and an *exoneretur* ordered to be entered on the bail piece, on payment of the costs of the action and of the application; although the recognizance had been entered into for his discharge out of custody after final judgment; and the certificate had not been allowed by the Lord Chancellor till after the time conditioned for making the render. *Bottomley v. Medhurst and another*, M'Cl. 399. S. C. 13 Pri. 709.

Misnomer of a defendant held to bail, no ground for cancelling the bail-bond, but must be pleaded in abatement. *Stockdale v. Benkin*, 1 Pri. 277.

The court refused to order a bail-bond given by a debtor, who had been arrested at the suit of a creditor, on whose petition a commission of bankrupt had been sued out against the defendant, pending a petition presented to the chancellor praying to be discharged from the arrest, to be given up to be cancelled; but they granted the defendant two days time after the petition should be heard to give notice of bail. *Wise and others v. Prowse*, 9 Pri. 391.

Where an assignment of a bail-bond had been taken on 30th Jan. for want of giving notice on the 29th, of putting in bail, and the plaintiff had proceeded against the defendant's bail on the bail-bond, and served process on the defendant and his bail, to which they appeared, and pleaded *comperuit ad diem*, the court made absolute a rule obtained by the plaintiff, calling on the defendant in the original action to shew cause why his appearance thereto should not be recorded as of the day when notice of bail being put in was served on the plaintiff's clerk in court; notwithstanding bail had been regularly put in, and notice had been given on the 30th, before the bail-bond could have been executed in point of fact. *Allday v. George*, 9 Pri. 406.

The defendant had become bail to the sheriff. The bail put in above did not justify on the right day, but two days afterwards, on further notice, appeared, and were justified after opposition, on payment of costs occasioned by their not appearing before. On the same day on which they justified, the bail-bond was assigned to the plaintiff, and a writ was immediately sued out against the defendant, and afterwards on the same day, the rule for the allowance of the bail was served. On being served with notice of declaration, the defendant's clerk in court gave notice that the proceedings were irregular. The plaintiff notwithstanding, signed judgment, and on the 16th of June sued out execution, and levied on the defendant's effects, under a *fi. facias* returnable 21st June (last day of Trinity term.) At the time when sheriff's bailiff entered, there was a person in the house in possession under a distress for rent, and it being considered that the goods were not of sufficient value to pay the rent, the execution was withdrawn. A few hours before that execution was withdrawn, the defendant was arrested on a *capias ad satisfaciendum* (21st of June); and from that time to the time of this application, remained a prisoner charged in execution, the plaintiff in the meantime having been paid the original debt. On the 25th of November he applied to be discharged out of custody from the execution, that satisfaction might be entered on the judgment; that the writ of *capias ad satisfaciendum* might set aside, and that the plaintiff should pay the costs: held, that the application was made too late, (although the defendant had sworn that he did not apply earlier for want of money to pay the expenses) and that, independently of that objection, under the circumstances, the rule would not have been made absolute; the Court saying, that not one of the points made could be sustained. *Edmond, Assignee of the Sheriff of Surrey v. Ross*, 9 Pri. 5.

Semble, Where the bail do not appear to justify on the day mentioned in the notice, but on a subsequent day, according to further notice, and the plaintiff on the morning of that last day, take an assignment of the bail-bond, and sue out process; the proceedings are not premature, although the rule for the allowance of bail be served on the same day. It is not a waiver of the assignment, that the plaintiff attended to oppose the justification of bail. S. C.

Semble also, a *capias ad satisfaciendum* may be sued out, and the defendant may be arrested thereon, before the return of a writ of *fi. facias* previously executed by entering on the possession of the defendant's goods, as soon as the writ of *fi. facias* is withdrawn, if during the whole time of such possession by the sheriff, a person is also in possession of the same goods, under a distress for rent. Rule to shew cause discharged, with costs. S. C.

Staying proceedings on bail-bond after error brought.] The Court will stay proceedings against bail, until the writ of error brought in the original action be determined, though the application be not made within the

four days allowed to the bail to surrender the principal. *Edwards v. Jameson, Forrest*, 25.

BANKRUPT.

Warrant of commitment.] The warrant of commitment of a bankrupt for not signing his examination, need not set out the examination. *Vaughan, B. deservente. In re T. Leak*, a bankrupt, 3 Y. & J. 46.

A warrant of commitment of a bankrupt for not signing an examination, concluded by committing him, until he should full answers make to the satisfaction of the commissioners, and sign and subscribe his examination. Held, that the conclusion was informal, but not defective in substance. S. C.

Execution in action by.] In action on promissory note, plaintiff became bankrupt, the assignees gave the defendant notice after judgment not to pay the debt recovered to any but their order; the attorney sued out a *fi. fa.* in the name of the bankrupt, the note having been deposited with him since the beginning of the action to secure a debt due to him from the bankrupt; a rule to set aside the *fi. fa.* was discharged. *Pope v. Wood*, 2 Anst. 577.

Affidavit of truth of special plea of bankruptcy pleaded puis darrien continuance.] Special plea of bankruptcy and allowance of certificate, pleaded and allowed in court on the day the record of a judgment pleaded in bar was to be produced, to prevent judgment of failure of record. Held, that such plea, though setting forth particularly all the matters relating to the bankruptcy, was sufficiently verified by affidavit to belief, &c. that it was, so far as related to the commission, proceedings under it, and certificate true in substance and fact. It seems that if the affidavit had been insufficient, it would not be amended. *Sharp and others v. Witham*, M'Cle. & Y. 350.

Certificate.] Money due upon a judgment in mesne profits does not fall under the protection of a bankrupt's certificate, granted under 49 G. 3. c. 12 s. 9. *Moggeridge v. Davis*, Wightw. 16.

Effect of certificate in discharging debts.] A defendant against whom, in an action of tort, a verdict has been taken, subject to the award of an arbitrator was held to be discharged from the debt by his certificate, obtained before the entering up of judgment where he had become bankrupt between the verdict and the making of the award; nor could execution be sued out on the judgment; because the plaintiff might have proved the damages recovered under the commission by production of the record; nor can he support such execution for the costs. *Beeston v. White*, 7 Pri. 209.

A *fi. fa.* issued on a judgment entered up under such circumstances, and executed, was set aside on the terms of the defendant undertaking to bring an action against the sheriff. S. C.

Promise after certificate to pay old debt.] A bankrupt who has obtained his certificate, if he afterwards promise to pay a creditor a debt due from him before his bankruptcy, revives the creditor's right to sue him and he may be arrested on such promise. *Dunn v. Jefferies*, 8 Pri. 531.

If a debtor who has become bankrupt and obtained his certificate, make a promise afterwards to a creditor to pay him at a future day the debt which was due him before the bankruptcy, he not only revives his debt, and thereby renders himself liable to be sued in its recovery, but may be held to bail in an action against him, founded on the demand so revived by the subsequent promise; for, as it becomes a good debt recoverable at law, it must have all the incidents of legal debt, and all the ordinary modes of proceeding to recover it are open to the creditor. Bail bond given by defendant cancelled accordingly. *Blackburn v. Administrator, &c. v. Ogle*, 8 Pri. 526.

BARON AND FEME, JOINT DEFENDANTS.

See APPEARANCE; JUDGMENT.

BILLS AND NOTES.

[*Rule to compute.*] Exchequer will now order it to be referred to the master, to compute principal and interest on a promissory-note, or bill of exchange, &c. (is the practice in the other Courts,) on motion. *See v. Stewart*, 4 Pri. 134.

BILL OF EXCEPTIONS.

party bringing error, and thus removing the reason before he has procured the judge's seal to a bill of exceptions tendered to him at the trial on the rejection of evidence, by so doing waives the bill of exceptions allowed by the judge. *Dillon v. Parker*, (in *re*), 11 Pri. 100.

semble, yet if there had been no waiver, the court cannot order a party to settle a bill of exceptions in order that it might be sealed and appended to the transcript of the record by amendment. *S. C.* *Ware*, within what time a party ought to procure judge's seal to a bill of exceptions? *S. C.*

BODY RULE.

See SHERIFF.

BOND TO THE CROWN.

See EXTENT.

[*Importation.*] The bonds given by masters of vessels under 26 G. 3. c. 40. are continuing bonds, and are in force as long as the same person is master of the same ship; but not when he becomes master of another vessel. *Rex v. Macleod*, 3 Pri. 209.

It is not necessary, therefore, that a fresh bond should be given on every voyage made by the vessel in his charge, for the same bond covers all voyages made in her by him, and may be sued on for breach of the conditions during any one or more of them. *S. C.*

Scire facias on bond to the crown for excise duty.

Plea of payment after day, but before writ issued, and acceptance by the crown in satisfaction, insufficient. *Rex v. Ellis*, 1 Pri. 23.

At. 4 Anne, c. 16. does not in general extend to crown. *S. C.*

Plea to *scire facias*, for breach of the condition of usual bond given not to re-land, where the merchant claims drawbacks on goods intended for export, that the defendant was prevented from shipping and exporting accordingly, in consequence of seizure of the goods by revenue officers, not answered in replication, that the glass had not been regularly shipped, or intended so to be, nor agreed in quantity with the notice given; imputing also a charge of delay in attempting to obtain allowance of the drawback for a larger quantity than was actually shipped, that the glass was lawfully seized for having a quantity of earthenware packed with it: replication held insufficient on demurrer. *Att. v. Pole*, 1 Pri. 387.

CERTIORARI.

Certiorari to remove a cause from the great sessions of the county of Curmathen, superseded on motion to court, and a *procedendo* ordered; and the costs of lay in the Court of Great Sessions, and the costs of application ordered to be paid by the defendant. *Att. v. Evans*, 13 Pri. 449.

CLERK IN COURT.

[*Privilege.*] A clerk in Court in Exchequer suing a person not entitled to exchequer privilege by reason of privilege, an attorney of K. B., does not lose

his privilege. *Elkins, side Clerk, and Another, v. Hardy, Gent., &c.* 1 Tyr. 274. 1 C. & J. 345. *S. C.*

COMPUTING BY MASTER.

The Court refused an application for a rule to compute interest and costs on a sum recovered by verdict, up to a given period, during which the plaintiff had been delayed, by various means, for two years and a half, made on an affidavit, stating circumstances of unparalleled delay and vexation, by which the plaintiff was put to an expence in costs of upwards of 1000*l.* in an ordinary case of an action on bills of exchange. *Jarrold v. Rowe*, 8 Pri. 582.

The Court granted an application, on behalf of the defendants, to refer it to the master to see what was due for principal, interest, and costs on a bond, which was the cause of action; and to stay all proceedings upon payment of the sum due and costs. *Smith, Administratrix, v. Allop and Others, Executors, M'Gle.* 309.

This Court will grant a rule to refer to the master to compute what is due for arrears of rent, under a covenant in an indenture of lease. *Wingfield v. Claverley*, 13 Pri. 53.

Reference ordered to the master to ascertain the sum due for principal and interest in an action on a bond, upon motion on the part of the defendants. *Smith, Administratrix, &c. v. Allop and Others, Executors*, 13 Pri. 823.

Money paid for interest on bond by representatives of an obligor through misrepresentation of the terms of the condition, which provided, that the property-tax should be deducted from the interest, of which, not having obtained sight of the bond, the executors were not aware: Held to have been improperly paid, and that they were entitled to be allowed it by the master on such reference. *S. C.*

Aliter, as to so much of the interest as had been paid by the obligor himself. *S. C.*

In debt on judgment referred to master to compute sum due for debt and costs, interest should be allowed on the whole debt due on the judgment. *Thomas v. Edwards*, 3 Anst. 804. See 2 Anst. 558.

CONCILIUM.

See DEMURRER.

CONDEMNATION.

The Court will set aside condemnation of the subject of seizure after the expiration of the usual time of fourteen days allowed for entering claims, on satisfactory affidavit of merits. *In re Ship Louisa Margareta* 1 Pri. 48.

The Court will set aside a condemnation of goods seized passed for want of claim, in order that the defendant may enter a claim under circumstances, where the party applying offers payment of the costs of the condemnation, on the terms of his paying also the costs of the application. And they refused, in such a case, to order the defendant to find bail as one of the terms of making absolute a rule to shew cause. *Att. Gen. v. Cullen*, 8 Pri. 668.

CONSOLIDATING ACTIONS.

The Court will not compel a party to consolidate actions brought on two promissory notes, though both notes became due, and both actions commenced in the long vacation, and the writs were returnable on the same day. *Le Jeune v. Sheridan*, Forr. 30.

CONSTABLES.

The 6 G. 4. c. 18. s. 6, merely puts warrants addressed to peace officers, in their official character, on the same footing on which warrants addressed to them by name stood previously; and therefore does not oblige, but only authorizes officers to execute the former. A notice of action to magistrates is not vitiated by

being in the form of a declaration, and unnecessarily ample, if it expresses the cause of action with sufficient clearness. *Gimbert v. Coyney and another*, M'C. & Y. 469.

CONVICTION.

A conviction on a statute varying on the face of it from the provisions of the statute and not shewing any offence to have been committed, is bad, and, though not quashed, its invalidity may be taken advantage of on the trial of an action of trespass for a distress taken under a warrant grounded on it. *Gimbert v. Coyney and another*, M'C. & Y. 469.

CORNWALL, DUCHY OF. See INTRUSION.

COSTS.

Of affidavits on a rule, see AFFIDAVIT.

On nonsuit.] A plaintiff suing as assignee of an insolvent debtor, is not by analogy to the case of executors and administrators within the exemption from 23 H. 8. c. 15; but if nonsuited must pay the defendant's costs. *Andrews, Assignee of Pain, v. Sealy*, 8 Pri. 212.

Nor will the court suspend the payment of costs on affidavit that the plaintiff has not received sufficient assets, to be paid *quando acciderint*. S. C.

Double costs.] A certificate, that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under 7 Jac. 1. c. 5. need not be granted immediately after the trial of the cause. Thus where the plaintiff is nonsuited, the judge before whom the cause was tried, may, after an interval of four years, upon an affidavit that the defendant was within the provisions of 7 Jac. 1. c. 5. grant a certificate to entitle him to double costs. *Norman v. Danger and another*, 3 Y. & J. 203.

Where the crown is a party.] In *scire facias* against the consor of a recognizance to the crown, no costs are recoverable by defendant though he succeed on demurrer and in error. *Rex in aid of Hollis v. Bingham*; 1 Tyr. 262.

In a suit by the crown on a bond under the post-horse act, the court cannot give costs against the crown though the farmer of the duties is the real party. *Rex v. Corum*, 1 Anst. 50.

For defendant under 43 G. 3. c. 46. s. 3.] The defendant was held to bail on an action for 25l. He pleaded in abatement as to 12l. 10s., and the general issue as to the remainder. Verdict for the plaintiff for the latter sum. On motion for costs under 43 G. 3. c. 46. s. 3, supported by affidavit that the defendant believed the plaintiff had sued out bailable process for the purpose of extorting from him the whole sum,—held not a case of malicious arrest within the statute. *James v. Francis*, 6 Pri. 1.

Where a sum of money less than sufficient to justify an arrest, paid into court after perfecting bail and pleading the general issue, had been taken out in the usual manner by the plaintiff, held that it was not a case for costs within 43 G. 3. c. 46. The court, under the circumstances disclosed by the affidavits, discharged the rule without costs, although moved with costs. Held on the authority of the cases that the word "recover," 43 G. 3. c. 46, implies by verdict. *Weaver and another v. Birdsall*, 12 Pri. 734.

If the plaintiff take out of court a less sum than that for which he has originally proceeded, and below the amount for which a defendant may be held to bail, held that, if the plaintiff give a good reason for taking it out, the case does not entitle the defendant to costs under 43 G. 3. c. 46. *Plummer and another v. Savages*, 6 Pri. 126.

On staying proceedings.] A defendant, on being served with process, and before declaration filed, took

out a summons calling on the plaintiff to shew cause why, on payment of a sum certain and the costs, proceedings should not be stayed. The plaintiff's agent, after taking time to consult his client in the country, stated to the agent for the defendant, that they intended to proceed for a larger sum, after deducting a sum from the original amount allowed to defendant to be set off, and consequently the summons could not be proceeded in, because the judge could make no order in such a case. *Edwards v. Harrison*, 11 Pri. 533.

The defendant's agent tendered the same sum, and costs, which were refused. A declaration was filed, and the general issue pleaded, and the defendant paid the money tendered into court, and obtained the usual rule for that purpose. The plaintiff afterwards took the money, so paid in, out of court, and served an order for taxation of costs. Under these circumstances, the defendant obtained a rule to shew cause why the master should not tax him his costs subsequent to the issuing the summons, and why they should not be set off against the costs to be allowed to the plaintiff before the summons. But the court ultimately discharged the rule, *with costs*, on the ground that it was not under the circumstances founded on the practice of this court—that the plaintiff had shewn enough to raise a strong presumption that more was really due, whilst the defendant had not sworn that more was not due—that the balance being small, was sufficient reason (if any were required) for not going on trial—that the rule was inconsistent with the original rule—and that the defendant's case did not justify the application. In a proper case, however, the court considered that they might interfere, in the manner now required of them, on a special application. S. C.

Attachment for non-payment of costs on allocatur.] The order made, on motion to pay money into court, that the defendant shall pay the costs, is imperative in that respect in this court, and if not paid when taxed, the plaintiff may have an attachment against the defendant for non-payment, which process (in the Exchequer) is final, in the nature of an execution, and therefore is not bailable. *Plummer and another v. Savage*, 6 Pri. 126.

The plaintiff may however proceed to try the cause if the costs are not paid, as is his only course in the court of K. B. S. C.

If the attachment issued on the *allocatur* be for more than the express amount, however small the difference, it is an irregularity, and ground for obtaining an order to shew cause why it should not be set aside. *Denial v. Bishop*, 13 Pri. 120.

On payment of money into court.] Where, in a country cause before declaration, the defendant took out a summons to stay proceedings upon payment of a sum less than the plaintiff's demand, and costs, upon which no order was made; and the defendant afterwards paid that sum into court, which the plaintiff's agent, having in the meantime consulted his principal in the country, took out of court. Held, that the plaintiff not having been guilty of fraud or vexation, was entitled to costs up to the time at which he took the money out of court. *Haworth v. Holgate and others*, 2 Y. & J. 257.

For not proceeding to trial.] See JUDGMENT AS IN CASE OF NONSUIT.

In quo warranto.] On judgment for relator, in *quo warranto* information he is entitled to costs. *Rex v. Amery, Dom. Proc.*, 1 Anst. 178.

Taxation.] A solicitor may proceed to tax his costs after verdict at law, notwithstanding an injunction to stay execution, with a view to commencing an action in his own name for the amount, after a final settlement between the parties by arbitration, without his concurrence. *Brooks v. Bourne*, 1 Pri. 72.

Reviewing taxation, requisites of affidavit.] The

avit to found a motion for referring it to the master to review his taxation of costs, must point out the objectionable charges specifically, and state the grounds of objection. *Daniel v. Bishop*, 13 Pri. 120. An affidavit to ground an order nisi, for the master to review his taxation, on account of overcharge, must point out the specific items thereof, and display shew that they are erroneous. *Daniel v. Bishop*, le. 61.

The court refused to grant a rule to shew cause why the master should not review his taxation of an attorney's costs against his client, where he had allowed fees for signing interlocutory judgments, which afterwards set aside with costs, and for opposing motions made for that purpose, objecting that the applying had not shewn that the proceedings claimed of had been resorted to *mala fide* and from motives inconsistent with a fair intention and a due regard to the interests of the client. *Lloyd v. Crutch-Lloyd v. Powell*, 13 Pri. 211.

It is not necessary that a party applying for an order upon the master to review his taxation of costs, should first pay into court the amount of the items in dispute of costs to which no objection has been made. An order for a document tendered, but not received in evidence, cannot be supported. *Ragnall v. Underhill*, 11 Pri. 510.

Costs charged allowed for the attendance and expenses of witnesses, must depend on the circumstances of the case. It is not because some of those who have been subpoenaed are not examined, that they are not allowed for in taxing costs. S. C.

Where a submission to arbitration in a cause in the Exchequer, is made a rule of K.B., and by the award costs are to be taxed by the master of the Exchequer, the court has no jurisdiction to direct a review of the taxation. *Chapman v. Lansdown*, 1 Anst. 273. [error in the House of Lords.] If a judgment is entered without costs in K.B., where costs ought to have been given, it can only be amended in the same manner. So in *Dowd. Proc.* no amendment can be made in a case after the Session. *Rex v. Amery*, 1 Anst.

COUNSEL.

[Indorsement on briefs of.] To support an action against a party, founded on an undertaking (entered by him after having appeared and pleaded to an indictment for an assault) to do an act in consideration of the prosecutor consenting to a nominal fine only imposed on him—the indorsement to that effect in the terms of the agreement between the parties on briefs signed by the counsel on both sides, was at nisi prius not sufficient to be left to the jury without proving the assent of the defendant; and a writ was directed on that ground, which the court did set aside. *Elworthy and another v. Bird*, 11 Pri. 222.

It is not sufficient, that if the counsel for a plaintiff do not submit to be nonsuited, they should intimate dissent to the learned judge, on his expressing himself of opinion that the plaintiff ought to be called. S. C.

COURTS OF EQUITY.

The court of equity may decide conclusively in the first instance, on all cases brought to a hearing, without directing an issue to be used, except in the cases of a bill by a heir at law and a rector. The direction of an issue by the court of equity is in its discretion, its object being solely to institute further inquiry, and for the better information of the court itself, in order for the trial of an issue is *ex mero motu*. So, it is equally in the discretion of a court of equity to grant or refuse a new trial of an issue directed to be tried at law, for the issue having been originally directed merely to satisfy the conscience of

the court on facts material to the equity of the case; it may order evidence to be received, although not directly admissible on other trials at law, and it will send the issue down as often as the result is not satisfactory; or, if satisfied that the finding of the jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called) had been received below. *Wood, B. dissentiente*. Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage (whether perfect or not), are good evidence (*quantum valeant*) of their subject-matter: although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *eiusdem generis*, and being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to effect third persons who were not privy to it, and could have had no cognizance of the matters to which it relates, — *Wood, Baron, dissentiente*. Such a book held to have been found in the proper custody, to make it evidence where it is in the possession of an owner who is so far connected with the abbey as to be possessed of some part of the former estates of the monastery, although no part of such estate be situated in the parish in which the question between the parties to the suit arises. The objection of *res inter alios acta* not applicable to such entries, and books, when offered to furnish a counter presumption, in order to rebut a presumption raised by the other side. *Bullen v. Michel*, 2 Pri. 399.

COURTS OF REQUESTS.

One of the original officers of the exchequer may sue jointly with an unprivileged person by *capias* of privilege without losing such privilege, and is, therefore, entitled to costs on recovering less than 5*l.* against an attorney of K.B. resident in London, notwithstanding 39 G. 3. c. civ. s. 10. (London court of requests act.) *Elkins and another v. Harding*, 1 Tyr. 274.

In an action in the Exchequer for work done, against a defendant residing in the *Isle of Wight*, where the verdict was taken by consent for 5*l.* the sum sued for being upwards of 5*l.*: held, that under the local act for the summary recovery of small debts in that island, the plaintiff was not entitled to costs. *Oakes v. Albin*, 13 Pri. 793.

The court will not, on a motion to enter a suggestion on the roll, receive the facts from affidavits, but will require the judge's report. S. C.

A person resident within the jurisdiction of the *Isle of Wight* court of requests, and owing a sum of 5*l.* on the balance of an account, is privileged to be sued for the debt in that court; and, therefore, if a creditor proceed, and recover a verdict to that amount in a superior court, the defendant is entitled to have a suggestion entered on the roll to deprive him of costs, pursuant to the 46 G. 3. c. 66. s. 11. 17. 40., notwithstanding that the contract was made elsewhere; and although the plaintiff was ignorant that the defendant resided within the jurisdiction, and claimed a larger sum. *Oakes v. Albin*, M'Clell. 582. 13 Pri. 793. S. C.

Where a rule nisi for entering such a suggestion has been obtained on affidavit, and affidavits have been made on the other side, and used in showing cause, fresh affidavits for the purpose of controverting the statements of the latter cannot be read in support of the rule. S. C.

If the plaintiff recover less than 5*l.* in an action brought in London, where the original debt has been reduced by payment, and not by set-off, the defendant will be permitted, on motion, to enter a suggestion on the roll, under the London court of conscience act,

in order to have his costs allowed. *Cook v. Johnson*, 2 Pri. 19.

CROWN PRACTICE.

Trial.] A defendant who has been arrested on a revenue information filed against him, and has entered into a recognizance of bail to appear and answer, cannot move to discharge such recognizance on the ground of the Attorney General not having proceeded to trial according to notice till after three clear terms (exclusively) have elapsed not after issue joined, but after the time for which notice of trial had been given. Thus, a defendant arrested in Michaelmas term, having given bail in December, and pleaded in Hilary term, and received notice of trial for the subsequent sittings, cannot move until after Michaelmas term. *Att. Gen. v. Bear*, 6 Pri. 89.

CROWN LANDS.

Sale.] An application for the sale of lands under the 25 G. 3. c. 35. need not be made personally by the Attorney General. *Rex v. Bulkeley*, 1 Y. & J. 256.

DAMAGES.

See INTEREST.

Although the jury on the execution of a writ of enquiry cannot give interest in an action for work and labour, yet where they have deducted on the whole amount of the plaintiff's demand ten per cent. in conformity with an agreement between the parties, that such deduction should be made for ready money, they may re-allow the plaintiff a proportional part of that deduction, on the balance found to be due to him, and which had remained for a considerable time unpaid. Affidavits of jurymen may be received on an application for setting aside their inquisition on the ground of their having allowed interest, where the facts were as above stated, and formed the subject-matter of the affidavit. *Milson v. Hayward*, 9 Pri. 134.

Excessive.] 200*l.* damages were given by a jury on a writ of inquiry for an assault in menacing the plaintiff with a whip, and snatching away his stick held up in his defence, and throwing it away—a new trial was granted for excessive damages. *Goldsmith v. Lord Saffron*, 3 Anst. 808.

DEATH.

See EXECUTION; WARRANT OF ATTORNEY.

Arrest by executors after death of testator who had also arrested. See ARREST.

DECLARATION.

Notice of.] In an action of simple contract against A. and B. the service of a notice of declaration on A. before an appearance is entered for B. is a nullity, and A. need not notice the irregularity till judgment is signed against him. *Ballantyne v. Ralph and another*, Forr. 31.

The writ was returnable the 6th Nov. "On or about the 1st," the plaintiff's attorney sent his agents who were also solicitors for the defendant, a notice of declaration being filed, to be served; and "on or about the 6th," received a letter from them, stating that the defendant had been served. A plea in abatement was delivered on the 13th. Interlocutory judgment signed as for want of a plea, was set aside for irregularity, without costs. *Kirby v. Hunt*, M'Clel. 65.

Where process was served on a defendant, in an action of trespass, to try a right, and the person serving it having left him for a few minutes, remaining in

sight during the interval, returned and delivered notice of a declaration having been filed conditionally, and an interlocutory judgment was signed for want of a plea, the court set aside the judgment on motion, on the terms of the defendant paying the costs of the application. *Qu.* Whether service of notice of declaration filed *de bene esse* on the same day, and within a short time after service of process, be sufficient. *The Mayor and Burgesses of Derby v. Wheelodon*, 9 Pri. 650.

The rule H. 60. G. 3. by which "it is ordered, that in all cases wherein the plaintiff, by the present practice of the court, would be entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice thereof given, four days exclusively before the end of the term in which the process is returnable, the plaintiff shall, from and after the first day of next Easter term, be at liberty to sign such judgment, provided the declaration be delivered or filed, and notice thereof given two days exclusively before the end of the term within which the process is returnable, (a rule to plead having been duly entered) does not extend to filing declarations *de bene esse*, so as to entitle the plaintiff to a plea of the term, on writs returnable two days exclusively before the end of the term. *Nock v. Southall*, M'Clel. 659.

Service of notice of declaration on the return-day, by a person going away, and returning a few minutes after service of the writ: held not irregular. S.C.

Filing.] In exchequer the original draft is filed, and copies delivered to each party. *Smith v. Bulkeley*, 2 Pri. 114; but see *Reg. Gen. ante*, p. x.

Entitling.] It is not a ground of error to entitle the declaration of Michaelmas term generally, and to aver therein that the cause of action accrued on the 18th Nov. in the same year. *Ruston v. Orston*, M'Clel. & Y. 202.

The rule of court, H. T. 60 G. 3. and 1 G. 4. authorizing plaintiffs to sign judgment for want of a plea, where the declaration is filed and notice given two days before the end of the term, in which the writ is returnable, does not apply to cases where the process is returnable on the last return.

Qu. Whether notice of declaration *de bene esse* can be regularly served on the day on which the process is served, and the writ returnable? *Nock v. Southall*, 13 Pri. 800.

Semble, that if it may, it is good service, if any interval elapse between the delivery of the writ and the notice of declaration. S.C.

By the bye.] No person can deliver a declaration by the bye in the court of exchequer, except the original plaintiff. *Griffith and others v. Humphreys*, 3 Y. & J. 218.

Joinder of defendants.] Where a *quo minus* had been issued against one defendant, and a *venire* against another, neither writ being bailable: held, that plaintiff might declare jointly against both. *Pitt v. Williams and another*, 1 Tyr. 303.

DEMURRER.

Concilium—arguing.] The court refused to set aside a rule for a *concilium* obtained on the 10th Feb. for arguing a demurrer (filed for delay) on the 12th, although the demurrer book had not been delivered on stamp to the defendant's clerk in court; and demurrer books had not been delivered by the defendant to the two junior barons, but the plaintiff had delivered the demurrer books to the chief and senior puisne baron, although so late as on the morning of the 10th. *Gent v. Vandermoelen*, 13 Pri. 247.

The rule for a *concilium* is a four-day rule: and where the demurrer is *bona fide* and really intended to be argued, it must be so at any period of the term; but where the plea is a sham plea, and the demurrer to the replication appears to have been filed for delay,

court, when there are not four days remaining in term, will grant a *concilium* for the last day of term. *Genl. v. Vandermoolen*, 13 Pri. 247.

Order for a *concilium* granted 21st June for argument on 26th June, last day of term, a demurrer to tiff's replication delivered on 18th June; de-
 ber book delivered 20th June, but no rule given
 ing it in (a), the court refused to set aside the
 when it appeared the demurrer was filed for
 the plaintiff having tendered an issue to the
 y on the defendant's pleas, though four days
 not been given to defendant to return the de-
 er. *Savile v. Jackson*, 11 Pri. 337.

diving paper books. *Commelin v. Thompson*,
 r. 346.

ne at which a motion may be made for with-
 ing a demurrer. *Farbrother and another v.*
ley and others, 1 Tyr. 437.

e paper books must be delivered to the judges
 e moving for a *concilium*. *Thelluson v. Bailie*,
 t. 499.; but see *Reg. Gen. Trin. 1831. ante* 519.
gument.] The court will not hear an argu-
 on a demurrer on the last day of term. *Milner*
nton, M'Clel. 493.; but see *Burnand v. Dick*,
 MSS. Mich. 1831.

here a defendant demurs for delay, and there
 ot sufficient days in the term to enable the plain-
 conform to the usual practice in cases of de-
 er, the court will allow a *concilium* moved for
 e last day but two of the term, to be drawn up
 e last day of term, though no rule be given to
 in the paper books, and none are in fact de-
 d. *Cooper v. Hawkes*, 1 C. & J. 219.

DIEM CLAUSIT EXTREMUM.

e crown may seize lands devised before lands
 nded, under a writ of *diem clausit extremum*.
The Estate of Hassell, M'Clel. 105.
 ground this writ a *scire facias* against the de-
 is not necessary where the debt is on record.

ere, whether an affidavit of danger be necessary
 ound a writ of *diem clausit extremum*. *Semble*
 S. C.

e crown may receive costs on the refusal of a
 n. S. C.

here a second writ of *diem clausit extremum* of
 este of the former, was issued by order of the
 (on motion for that purpose, and also that the
 s whose conduct had rendered the application
 ary, might be ordered to pay into court the
 y for the recovery of which the writ had been
 l; the latter part of which motion having been
 rawn by the counsel for the crown, in consi-
 on of which the issuing of the process was not
 ed), founded on a necessity for a new writ,
 o have been the consequence of the first have-
 en suffered to expire from forbearance to exe-
 t till the return, at the request of the devisees of
 n estates of the deceased crown debtor, upon
 express undertaking to pay the money on the
 day of the writ, which they did not perform,
 ert refused an application, made on the part of
 devisees, that the minute of the order entered
 that motion might be varied in certain respects
 a view to have the process, which had been
 ssed to the sheriff of the county only wherein
 state devised to the applicants lay, directed also
 st the property which had descended on the heir
 v of the deceased crown debtor) on the ground
 he conduct of the parties applying, in not ful-
 y; their engagement, which had occasioned the
 city of the second substituted writ, was such as

to exclude them from any claim on the attention of
 the court in making such an application.

The motion was refused in such a case, with costs;
 for although, by the practice, the general rule is,
 that the crown neither pays nor receives costs, as
infra dignitatem, yet where motions are irregular,
 and are out of the ordinary routine of the proceed-
 ings, the court orders the party to pay costs, that it
 may operate as a check to such applications.

There is no necessity (*semble*) for an affidavit that
 the debt due to the crown from the deceased crown
 debtor is in danger of being lost, if the process be
 not issued in order to found a motion for a writ of
diem clausit extremum.

There is no such principle of proceeding in this
 court, in the execution of a writ of *diem clausit ex-*
tremum, as to make it necessary that the crown must
 employ the process, in the first instance, against lands
 of its deceased debtor that have descended on his heir
 at law, before it can be directed against lands which
 have been devised by him. On the contrary, all the
 lands are equally and simultaneously liable, and the
 crown may elect to proceed against any or all, suc-
 cessively or at once.

A *diem clausit extremum* may be issued immediat^e
 against the terre-tenants, without any previous ju-
 dicial proceeding. *Rex v. Hassell*, 13 Pri. 279. See
Ex parte Hipplesey, 2 Pri. 379.

DISCONTINUANCE OF ACTION.

After a double default, and peremptory under-
 taking given, the court permitted an administratrix
 to discontinue an action, where the declaration con-
 tained two sets of counts, the one laying the pro-
 mises to the intestate, and the other to the plaintiff
 as administratrix, upon the terms of paying the costs
 of the latter counts, there appearing to be no vexa-
 tion on the part of the plaintiff. *Blakeney et Uz*
v. Edwards, 2 Y. & J. 559.

See tit. PLEADING.

DISTRINGAS.

Where the defendant has gone abroad, the service
 of the sheriff's summons granted on a writ of *venire*
facias ad respondendum at his last place of abode is
 regular. *West v. Dalton*, Forr. 29.; but see *Petty*
v. Smith and another, 2 Y. & J. 111.

Where, since 51 G. 3. c. 124., the plaintiff elects
 to proceed by *venire* and *distringas* according to the
 ancient practice of this court, a personal service of
 the *venire* is not requisite. *Kemp v. Sumner*, 2 Y. &
 J. 405.; but see *Pennell v. Kingston*, 1 Tyr. R. 495.

Service of *venire* on defendant's servant, at his
 dwelling-house, during his absence abroad, not suffi-
 cient to found a *distringas*, nor will the court grant
 a rule to show cause why such service should not
 be sufficient. *Caulin v. Sir Robert Lawley*, 2 Pri. 12.
 See *Hall v. Gumble*, 1 Tyr. 490.

Partners in trade resident at Hamburg, had a
 warehouse in Manchester: service of *venire*, by leav-
 ing it with their servant at the warehouse, was held
 not sufficient to ground a *distringas* to levy issues
 in order to compel their appearance; and a *distringas*
 which had issued was set aside with costs. *Hall v.*
Gumble and another, 1 Tyr. 490.

The court will not increase the issues on a *dis-*
tringas sued out without complying with 7 & 8 G. 4.
 c. 71. § 5. *Pennell v. Kingston*, 1 Tyr. 495.

By rule of court, Trin. Term 1753, it is ordered
 that where issues shall be obtained on any writ of
distringas to be issued out of Exchequer, the plaintiff
 may, immediately after the return thereof, apply by
 motion to that court for increasing issues on further
 process to be issued between the parties, which said
 issues shall be increased from time to time at discre-
 tion of the court. *Lamb v. El. Blessington*, 5 Pri. 639.

(a) See *Reg. Gen. Trin. 1831*.

The common issues (40a.) having been levied under a first distringas on a *venire*, the court increased the issues on an application for a second *distringas* to 100l., the amount of the debt being 690l. due on a bond for that sum, and interest. *Ibid.* But see *Pennell v. Kingston*, 1 Tyr. R. 495.

A *distringas* will not be granted without personal service of the *venire* pursuant to 7 & 8 G. 4. c. 71. § 5. unless on facts which almost irresistibly show that the defendant kept out of the way to avoid that service. *Pitt v. Eldred*, 1 Tyr. 128. 1 C. & J. 147. S. C.

In order to obtain a *distringas* without personal service of a *venire*, a full and distinct affidavit is necessary to satisfy the court that the defendant keeps out of the way to avoid personal service. *Winstanley v. Edge*, 1 Tyr. 276.

A *distringas* will not be granted without personal service of the *venire* pursuant to 7 & 8 G. 4. c. 71. § 5. unless on facts from which it may reasonably appear to the satisfaction of the court that the defendant kept out of the way to avoid that service. *Godkin v. Redgate*, 1 Tyr. 287.

Requisites of affidavit in order to obtain *distringas* where the *venire* has not been personally served. *Whitahome v. Simons*, 1 Tyr. 293.

Semble, a *distringas* should not issue till the eighth day after that on which the *venire* is made returnable. *Thomas v. Elder*, 1 Tyr. 496.

Requisites of affidavits in order to found a *distringas*. *Dobell v. King*, 1 Tyr. 498. n. and *Anon.* 499. n.

Form of affidavit. *Thomas v. Elder*, 1 Tyr. 496. n.

A plaintiff having arrested two partners on a *quo minus*, and proceeded against an absent third by *venire*, under which issues, and increased issues, had been levied by *distringas* on the partnership goods, the court discharged with costs a rule obtained to set aside the proceedings, and order the money levied to be restored, and the effects to be delivered up, although it was sworn, on the part of the absent defendant, that he was absent on his business of mariner, and not for the purpose of avoiding proceedings. *McMurdo v. Birch*, 5 Pri. 522.; but see *Hall v. Gumble and another*, 1 Tyr. 490.

Distringas granted on service of *venire facias* at dwelling-house, on defendant's wife, good. *Hall v. Faulkner*, 2 Pri. 4.; but see *Pitt v. Eldred*, 1 Tyr. 128. and other cases, ante.

Service of *venire facias*, by leaving it with a clerk of the defendants at their counting-house, not sufficient to obtain *distringas*, though after several ineffectual calls made for the purpose of personal service. *McNabb v. Ingham*, 2 Pri. 9.

The court will not grant a *distringas* against a defendant who has not been served with process, other than by delivery of it to a person at whose house he had recently resided, unless it appears that he then lived there. *Horton v. Peake and another*, 1 Pri. 309.

Where a defendant is abroad, a plaintiff may still (since the 51 G. 3. c. 124.) issue a *distringas* on service of the *venire facias* for the purpose of compelling his appearance thereby as he might have done before the act; but not for the purpose of enabling the plaintiff to enter an appearance for him, so that he may proceed thereon to final judgment as if the defendant himself had appeared. *Nicholson v. Bowness and Hall*, 3 Pri. 263. *Dwerryhouse v. Graham*, 3 Pri. 266. n. but see *Hall v. Gumble*, 1 Tyr. 490.

DUTIES, DOUBLE. See STATUTE.

EJECTMENT.

Service of declaration.] If a declaration in ejectment is duly served before the essoin day (or *semble* now before the 1st day of term) the omission in the

notice of the term in which the tenant is to appear, is immaterial. *Doe v. Roe*, 1 Tyr. 280.

After several ineffectual attempts made to serve a tenant in possession with declaration in ejectment, on occasion of the last of which, his servant admits that he is in the house, but refuses to permit the person applying to see him, if the declaration be then delivered to the servant, the court will make an order that such service shall be sufficient. *Doe d. Harvey v. Roe*, 2 Pri. 112.

Service of declaration in ejectment in the name of the tenant, on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledges being informed of the service is sufficient to obtain judgment against the casual ejector. But it should appear clearly from the affidavit, that the person who was the object of service, was tenant in possession. *Doe d. Walker v. Roe*, 1 Pri. 399.

Service of declaration in ejectment since 11 G. 4. and 1 W. 4. c. 70. §. 6. and 1 W. 4. c. 3. § 3. when the first day in full term falls on Sunday. *Doe v. Roe*, 1 Tyr. 499.

Service of rule for judgment on tenant in possession after irregular service of a declaration in ejectment on the essoin day. S C.

Where the affidavit of service of declaration in ejectment stated, that it had been left with the wife of the tenant in possession, the husband having absconded, it was held to be insufficient to found a motion for judgment against the casual ejector. *Doe d. Harrison v. Roe*, 10 Pri. 30.

Affidavit of service of declaration.] Affidavits of the service of declarations in ejectment may be sworn before the attorney in the cause. *Doe dem. Cooper v. Ross*, 2 Y. & J. 284.

Discharging consent rule to defend as landlord.] Where on an ejectment against the tenant in possession who came into possession as tenant of the lessor of the plaintiff, a third person having an adverse title entered into a consent rule to defend as landlord, the court discharged the consent rule with costs. *Doe d. Horton v. Rhys*, 2 Y. & J. 88.

Costs of signing judgment.] Rule calling on the tenant in possession to show cause why she should not pay the costs of signing the judgment, and of the application to set it aside discharged. *Semble*, the proper remedy in such case is by action against the tenant in possession, if there have been collusion. *Doe d. Ingram v. Roe*, 11 Pri. 507.

Costs.] The costs of an ejectment may be recovered in an action for mesne profits, though the defendant has appeared and pleaded in the ejectment, and no costs have been taxed. *Symonds v. Page*, 1 C. & J. 29.

ELECTION.

Petition recognizances. This court has jurisdiction over recognizances under the 28 Geo. 3. c. 52. (providing for petitions against undue returns of members of parliament) upon their being certified into the exchequer by the speaker of the House of Commons upon the report of the select committee, and in case of sufficient merits they will interfere to discharge such recognizances so estreated, upon a summary application by rule to shew cause. The parties entering into the recognizance are not bound to attend the committee to the last moment, or to appear to hear the determination of the committee, as to whether the petition be frivolous or vexatious. *Ex parte Williams and others*, (his surties), 8 Pri. 1.

ERROR.

A writ of error is allowed two days after the return of the *co. ss.* The bail may be sued pending the writ of error which is no supersedeas. *French v. Casnoe*, 1 Anst. 176.

Over of error ought to give the same judgment reversal which the court below ought to have.

Rex v. Amery, 1 Anst. 178.

its in Error. See *CORR.*

is not an objection to a motion to *non. pros.* if error, that the judgment roll has not been set by the defendant in error, so that the plaintiff transcribe the record, because it was in error of the plaintiff in error, by an application to the court below to have compelled the defendant to complete the record. *Dunbar v. Parker*, 592.

in error. See *BAIL*.

ere the issues are entered informally, a court or will adjourn the hearing to afford an opportunity for the party to apply to the court below to the record unless counsel consent to argue turning such an amendment. *Hawkey v. Bor-* 1 Y. & J. 376.

hequer chamber will not reverse a judgment courts below merely on the ground of defendant error not appearing without going into the assigned. *Harrison v. King*, 4 Pri. 46.

ersedeas.] Service of notice of the allowance writ of error, (bail in error not having been put in the tipstaff having brought the defendant in error into court, (where the notice of the allowance was tendered to him,) for the purpose of his charged in execution, is not sufficient to give effect of a supersedeas, so as that the defendant apply for his discharge, after having been in execution. It should also be served on the defendant's attorney. Had bail in error been perfected it had been ground for a special application to discharge the defendant out of custody. *Smith v. Carruthers and another*, 4 Pri. 289.

ESTREAT.

See *FINES*, &c.

estreat will not be amended after the term in which it has been filed. Leave given to file a per-*treant nunc pro tunc* instead of a defective one, had been returned and filed in a proceeding under 3 G. 4. c. 46. and 4 G. 4. c. 37. *Anon.* 251.

EVIDENCE.

re copy of affidavit.] In the exchequer the office of an affidavit made in another cause is good evidence in that which is before the court. *Wightwick v. Forrest*, 153.

EXCEPTIONS, (BILL OF)

an exception taken in a bill of exceptions, which the whole evidence was set out, that the evidence for the defendant was sufficient to entitle the defendant to a verdict and to bar the plaintiff's.

Held, that a court of error might look to the evidence on both sides, to see whether the verdict of the plaintiff was sustained by the evidence, whether an objection can be raised to evidence to which no exception has been taken by the defendant. *Vines v. The Corporation of Reading*, 1 Y. &

EXECUTION.

et. fa. tested before defendant's death, but in which it was taken out, and executed after it, is bad, and a writ of *facias* ought to be issued on it. *Walker v. Walker*, 3 Anst. 680.

ing.] The court will not interfere to stay execution on a judgment recovered in trover against the defendant, till the plaintiff shall do any act, how reasonable, to make the defendant a title to the matter of the action, for they have no jurisdiction to do so. A rule for that purpose discharged

with costs. *Butts and others, Assignees, v. Bilke and another*, 4 Pri. 291.

Setting aside.] An execution sued out against the goods of a defendant on a judgment recovered was set aside with costs, and the money which had been levied under it ordered to be restored, the defendant having been, pending the action, discharged under 1 G. 4. c. 119. *Darley v. Brown and another*, 8 Pri. 607.

A plaintiff will not be permitted, on motion, to quash a writ of *capias ad satisfaciendum*, sued out and lodged with the sheriff for the purpose of fixing the defendant's bail in the usual course, on the return of *non est inventus* where the defendant has voluntarily surrendered in discharge of his bail before the return of the *ca. sa.* and afterwards become bankrupt; although the plaintiff undertakes to enter an *exoneretur* on the bail piece, and make an affidavit that it was never intended to take the defendant into execution upon the *ca. sa.* *Quere*, how far the practice of making such formal return of *non est inventus* is sustainable, or whether it is not an abuse of the process? *Stott v. Smith and another*, 8 Pri. 512.

The court will not interfere to set aside a *fieri facias* which has been issued and executed by a levy having been made on a summary application by motion, on the ground of the allowance of a writ of error having been served; because the party, if injured by the proceeding, has an effectual remedy by bringing trespass, which he may maintain if the levy be wrongful. The writ of error is a writ demandable of right, and should be awarded to the subject, *ex debito justitiæ*; and therefore the court will require a very strong case to supersede it. In this case the court discharged the rule without costs, although moved with costs. *Bleasdale and others v. Darby*, 9 Pri. 606.

The court will not set aside a writ of execution issued after allowance of a writ of error served on the plaintiff, if the writ of error describe the person suing as the king's debtor, when in fact he had proceeded on a *capias* of privilege. *Smart, Gt. one, &c. v. Taylor*, Gt., 1 Pri. 312.

EXTENT IN CHIEF.

In general.] The proceeding by writ of extent and all proceedings thereon, interlocutory and final (*semble*), are proceedings at law. *Wall v. Att. Gen.* 11 Price, 643.

Distinction between extent in aid and extent in chief in the second degree. The statute 57 G. 3. c. 117, does not apply to extents in chief in the second degree; therefore the crown may proceed by extent to recover a debt due from a person indebted to the crown debtor, a collector of taxes) who had received and misapplied the crown's money, although he be not a debtor to the crown within the 4th section of that statute. *Rex v. Wm. Bell. Rex v. John Shackleton*, 11 Pri. 772.

Neither does the rule of court T. 3. G. 4, respecting affidavit of danger as ground for extent in aid, apply to extents in chief in the second degree. S. C.

It is not necessary in the affidavit made for obtaining a baron's fiat for such an extent, that there should be any averment of the insolvency of the crown debtor, or any fact stated from which it may be inferred. Nor need collusion be negatived. S. C.

The protection of parishes from reassessment is an object of the case of the Court; and the necessity of process of extent in the second degree for that purpose, where a collector is become defaulter, is a strong ground for granting the fiat; and the existing liability of the parish is consequently no answer to the objection of the crown debt not being in danger. S. C.

What may be taken under? When an interest in

premises, leased for lives, and for a further term of years after the decease of the survivor, had been extended, and sold by the sheriff under a writ of *venditioni exponas*, but no order of court had been obtained for the sale under stat. 25 G. 3. c. 35. the court refused to confirm the sale, and order the remembrancer to execute a conveyance to the purchaser. *Rex v. Blunt*, 2 Y. & J. 120. And see *Rex v. Royd*, 2 Y. & J. 122, n. *Rex v. Adam*, 2 Y. & J. 122, n.

Extent against the "lands and tenements" only of the crown debtor without including "goods and chattels" is irregular. *Rex v. Lamb*, M'Clel. 402.

The lien of the crown for duties in arrear, attaches on the subject-matter in respect of which they arise, although process do not issue till after an assignment of it to a provisional assignee under a commission of bankruptcy. *Rex v. Dale*, 13 Price, 739.

Semble, that the lien of the crown for duties in arrear, is devisable, and confined to the several specific matters in respect of which the various sums of the duties have occurred; and that the whole is not liable generally to the satisfaction of the duties arising on each several part. S. C.

Although the title of the crown attaches from the teste of the writ, it is commensurate only with the interest of its debtor; and, therefore, when that interest was the title of a lessee to a lease, and was determined by the act of seizure under a claim of forfeiture on its being extended or taken in execution, the title of the crown was defeated by the same event. *Rex v. Topping*, M'Clel. & Y. 544.

An equitable mortgage by deposit of title deeds by an accountant of the crown, in the hands of one who has an opportunity of knowing that the depositor is or may become a debtor of the crown, is not available against an extent. *Broughton v. Davis and Same v. Att. Gen.* 1 Pri. 216.

Quære, whether such deposits by the king's debtor is good in any case against the crown? S. C.

A writ of extent binds from the teste, and such property as a bill of exchange is bound while in custody of the debtor. *Rex v. Lambton*, 5 Pri. 428.

The stat. 56 G. 3. c. 50, although passed for general good and public benefit in promoting good husbandry, does not bind the crown; therefore sales of goods seized under prerogative process are not within it, and the sheriff must sell unconditionally.—Thus he cannot sell crops as subject to tithes: he must sell without any qualification. *Rex v. Osbourne*, 6 Pri. 94.

Calicoes in the white frame, marked the property and manufacture of third persons, in the hands of the printer, are not liable to seizure under an extent for by-gone duties, due from the printer, by 28 G. 3. c. 37—21, the printer not being the maker or manufacturer within the meaning of that act. *Rex v. Tregoning*, 2 Y. & J. 132.

Quære, whether printed calicoes, the property of third persons, in the hands of the printer, are liable to seizure under an extent of duties, in respect of those goods, due from the printer by virtue of stat. 28 G. 3. c. 37. § 21 l. S. C.

An equity of redemption may be taken under an extent. *Rex v. De La Motte*, Forrest, 162.

A simple contract debt to the crown will not bind the land in the hands of a bona fide purchaser. *Rex v. Smith*, Wightw. 34.

D. by marriage articles dated 1796, covenanted to settle certain lands to be purchased with certain money to uses in strict settlement. In 1808 gave bonds to crown. In 1812 bought lands in fee and had a mortgage term assigned to a trustee to attend the inheritance, and the estate then settled to the uses declared by the articles under which he himself only took a life interest: held, that the settlement being voluntary, the term did not protect the inheritance of

the fee against the crown's debt. *Rex v. St. John*, 2 Pri. 317.

A term of years originally created out of an estate purchased by a person who afterwards became indebted to the crown to secure a sum due by one of the vendors and vested in a trustee for that purpose, and after several mesne conveyances assigned to a trustee for another purchaser of the estate for a valuable consideration without notice, to attend and protect the inheritance, such latter purchaser claiming directly under the first incumbrancer by a title paramount to the crown debtor is not liable to an extent for the crown debt. *Rex v. Lamb*, M'Clel. 402. 13 Pri. 649. S. C.)

Semble, An extent against the lands and tenements only of the crown debtor, without including goods and chattels is irregular. S. C.

Whether the usual bond taken to the king, his heirs and successors, from the committee of a lunatic be, and a bond to the crown, within 33 Hen. 8. c. 39. § 50, as that an extent may be issued on it—*quære*? S. C.

Upon an extent against one partner the crown can only take the separate interest of the partner, and not liable to the partnership debts. *Rex v. Sander and another*, Wightw. 50.

If an usurious bill of exchange be taken under an extent against the person who illegally discounted it, it will have no greater legal effect than if it were sold in his possession. *Rex v. Ridge*, 4 Pri. 50.

PROCEEDINGS ON EXTENTS IN CHIEF.

Inquisition, scire facias, &c.] An inquisition finding special matter without stating any conclusion as to a fact is bad, and may be quashed on motion. *Rex v. Sherwood*, 3 Pri. 269.

Affidavit for fiat.] The affidavit on which a fiat is an extent in chief against the surety of his principal in a bond to the crown is obtained, must show a distinct breach of the bond, or the fiat will be quashed on motion, and the extent and subsequent proceedings set aside. In the present case the affidavit was, with reference to the bond, held not to be sufficient for the purpose of authorizing the fiat. *Graham, Baron, dissentiente. Rex v. Marsh*, 13 Pri. 826.

An affidavit for an immediate extent is chief against a bond-debtor to the crown, should contain a distinct, positive, and unequivocal allegation of a breach of the bond; therefore where the allegation of the breach in the affidavit was ambiguous, an extent issued against one of the obligors in a bond, to the crown, was set aside. But where the extent is issued against a surety, the affidavit need not state that application has been made to the principal debtor for payment; or that he is in decayed and insolvent circumstances. *Rex v. Marsh*, M'Clel. 688.

Where a rule nisi for setting aside an extent in chief has been regularly argued, and confirmed; the court will not grant an application on the part of the crown to have it re-argued. S. C.

After defendant has obtained time to plead he cannot object to the affidavit on motion. *Rex v. Rippon*, 3 Pri. 38.

A defendant in an extent having moved to quash it, on facts stated by affidavits, which are satisfactorily answered, whereon a venditioni exponas issued, will not afterwards be permitted to enter a claim and traverse the inquisition. *Rex v. Bickley*, 4 Pri. 323.

The inquisition is not wholly an ex parte proceeding, and a claimant of property in the goods inquired of may assert his claim before the sheriff, and cross examine witnesses for the prosecution, in order to show that the goods belonged to him; and if the sheriff refuses to permit such interrogatories to be put, the court will set aside the extent and inquisition. *Rex v. Coltingridge*, 3 Pri. 646, 647, referring to p. 280. See *Rex v. Bickley*, 3 Pri. 451.

an inquisition to find debts executed in vacation returnable in the following term, and a writ of *scire* be issued thereon, tested as of the term preceding the vacation, the Court will set it aside for the repugnancy which must appear on the face of the record: till they allow it to be aided by inserting the true by means of a memorandum on the record. *Rex v. Pearson*, 3 Pri. 288.

Where a writ of *scire facias* is moved to be set aside, as having been irregularly issued, (not having been irregularly served, the motion may be made, and granted. *S. C.*

The crown has not an election to proceed against its debtor either by extent or *scire facias*, where he is not solvent. *S. C.*

Scire facias may issue in vacation, but only where the debt which it seeks to recover is actually due before the end of the proceeding term, or it must be allowed as of the next subsequent term. *S. C.*

A person employed in the service of the crown, as a commissary general to the forces abroad, and an assistant commissary in the islands of Guernsey and Jersey, and employed in the negotiation of bank of England notes received from the paymaster-general of the forces, and of bills of exchange received from the treasury on account of the public service, having received specie on the same account, is accountable to the crown, and is as such accountable, without statute of the 13 Eliz. c. 4, § 1; and his lands, which he was seized at any time during the period of his accountability, are bound by his engagement to the public, and subjected to the prerogative prior security and payment of the balance ultimately declared against him. *Rex v. Rawlings*, 12 Pri.

Where an extent to find debts had been issued against such a person, and an inquisition taken thereupon, the proceeding held to be no objection to a second extent and inquisition by the same revenue board, against the same property, on a prior claim. *S. C.*

A found and support such proceedings, a statement of the party owed to the king a sum of money found to be due from him to the crown, as the balance of an account delivered in upon oath to the commissioners for auditing the public accounts, in his capacity, &c. is a sufficient averment and finding of a debt due to the king. *S. C.*

A person claiming to be an incumbrancer on lands sold by the crown under an extent and inquisition against a crown debtor, is not entitled to notice of the making of a further inquisition under another extent against the same person, on a similar charge, of prior default. Although on the first inquisition the jury had found him an incumbrancer on the estate found to be due to the debtor. *S. C.*

The Court refused an application on the part of the incumbrancer, for an order, that he might have notice of the holding any further inquisition. *S. C.*

An inquisition to find debts, &c. on an extent, is wholly on ex parte proceeding; and a claimant of property in the goods inquired of, may assert his claim to the sheriff, and put material questions to witnesses examined by him on the part of the prosecutor, by the way of cross-examination, to show that the debt is not due to him. And if the sheriff refuse to permit such interrogatories to be put, the Court will set aside the extent and inquisition. *Rex v. Bickley and others*, 3 Pri. 451.

Where, Whether a claimant is entitled to bring forth other evidence in support of his claim. *S. C.*

The Court will set aside a writ of *scire facias*, issued on an extent, if the warrant for the commission and debts have not been signed by a baron, no application having been made for such signature. *Rex v. Thompson and another, Executors*, 3 Pri. 278.

Proceedings by prerogative process are not within

4 A. c. 16. so as to require special demurrer notwithstanding s. 24. *Rex v. Wade*, 6 Pri. 621.

If an inquisition executed in vacation be returnable in the following term and a writ of *scire facias* be issued thereon, tested as of the term preceding the vacation, the Court will set it aside for the repugnancy which must appear on the face of the record. *Rex v. Pearson*, 3 Pri. 288.

When an extended estate has been sold under 25 G. 3. c. 25. and the sale confirmed by the remembrancer's report and the usual orders, but a good title cannot be made, the crown may move to discharge the purchaser without his consent and without payment of his costs incurred in consequence of the purchase. *Rex v. Cracroft*, 1 M'Clel. & Y. 460.

The Court will not make an order on the attorney general to reply to a plea to an extent, without a previous application to him for that purpose. *Rex v. Slee*, M'Clel. & Y. 361.

Where a debtor to the crown took out an extent for a large sum when a small part was on his own shewing capable of dispute. Held, that the extent was not void. *Rex v. Sheriff*, 1 Anst. 901.

The Court will not entertain a motion in a case of extent without having the writ before them. If two writs of extent are issued, one for a joint debt, and the other for a separate debt, in the same sum, on inquisitions finding a joint debt, and a separate debt, on different sums, the Court will not set them both aside, on the ground of the irregularity of one of them, though confessedly a mistake, but they will support that which can be shewn to be correct. An extent may be issued on an inquisition and fiat of eight years old, and no new affidavit or fiat is requisite, nor is any proceeding by *scire facias*, or otherwise, necessary to revise such extent. *Rex v. Mallett and Others*, 1 Pri. 395.

Where a joint debt has been found, the death of one of the debtors in the interval between the fiat and extent does not vitiate the proceedings. *S. C.*

[*Postponing trial in scire facias under extent.*] The Court will not postpone the trial of an issue joined in a *scire facias* (issued on an inquisition under an extent in chief against a bankrupt crown debtor), to recover a debt found to be due from the defendant to the debtor of the crown, till the coming in of the answer to a bill in equity, filed by the defendant against the crown debtor for a discovery, under which an injunction had been obtained, for want of answer, to restrain the crown debtor from proceeding in an action commenced by him against defendant for the same debt, on the application of the defendant in the *scire facias*; because the statements in the answer could not, in any possible view, be given in evidence by the defendant, in support of the issue taken on the defendant's plea traversing the debt due from him to the crown debtor. *Rex v. Williams*, 13 Pri. 181.

[*Claiming goods seized by.*] Leave given under special circumstances, verified by affidavit, to appear and claim property seized under an immediate extent, the usual rule for that purpose having expired upwards of five months before without any claim being made by the party. *Rex v. Humphrey*, M'Clel. & Y. 173.

The Court will admit a party claiming goods seized by the sheriff, under a writ of *copias utlagatum*, to enter his claim and traverse the inquisition after the time for so doing was expired, and a *venditioni exponas* executed, where the claimant's attorney has mistaken his course (having brought an action against the sheriff, instead of having claimed and traversed) on payment of costs. *Rex v. Randell*, 5 Pri. 576.

Where goods are in the hands of a sheriff, and are claimed by a subject as seized under a *fi. fa.* and by the crown under an extent as having a lien on the goods for duties, the Court will not stay the proceedings of the crown so as to let the question be tried in K. B., for it is the prerogative of the crown to have all

questions relating to the revenue decided in Exchequer. *Rex v. Pichman*, 3 Anst. 852.

It is sufficient if a defendant, claiming goods seized under an extent, traverse the property, being the debtor to the crown's debtor at the time of the seizure or of laying the inquisition, and it is not necessary to say "at the time of the issuing the extent." *Rex v. Lambton*, 5 Pri. 421.

Poundage. Two extents having issued against A. and an extent in aid into another county against B. for the same sums. B. paid the whole debt, giving notice to the sheriff to retain the money till the legality of the extent in aid was tried; afterwards A. paid part of the money to B. in consequence of an agreement among themselves. The sheriff who took the inquisitions against A. is not entitled to any share of the poundage. *Rex v. Boules*, Wightw. 116.

Where an extent in chief had been issued for the recovery of a sum of money, being proceeds of assessed taxes for a part of a year, deposited by a collector with a banking-house which had stopped payment, and such sum was partly composed of balances left in the hands of the collector upon his several monthly payments to the receiver general, the Court refused to refer it to the king's remembrancer to see (in effect) whether the poundage upon all those payments ought not to be deducted from the sum mentioned in the extent, as being the collector's and not the king's money; upon the grounds, 1st, That the application was without precedent: 2d, That the collector's title did not accrue till the completion of his collection and payment of his entire assessment: 3d, That the same did not come within the jurisdiction of this Court as a debt, or liquidated demand, but was subject to the control of the lords of the treasury, who have all the requisite accounts before them, as an equitable claim to be adjusted, or wholly disallowed, according to circumstances: 4th, That it would be impossible for the master, without the accounts, to see whether ultimately the collector would have any claim. *Rex v. Marsh, and others*, M'Cle. 681.

Two extents issued into different counties, both sheriffs levied to the whole amount. Upon the one the debtor paid the debt. The sheriff to whom it is paid, is entitled to the whole poundage. *Rex v. Fry*, 2 Anst. 358.

The sheriff cannot charge a per centage for auctioneer who sells under an extent besides his poundage. *Rex v. Crackenthorp*, 2 Anst. 412.

Two extents issued into different counties for the same debt, both sheriffs seized goods; the debt was paid to the one before a *venditioni exponas* issued to either; he shall have the whole poundage. *Rex v. Barber*, 3 Anst. 717.

Proceeding where crown debtor is an insolvent. Course of proceeding on the part of an insolvent debtor of the crown, in prison under an extent, for the purpose of obtaining his discharge under the 1 Geo. 4. c. 119. s. 41. *supersedens quoad corpus*. This Court is not bound by the general provisions of the act, in respect of insolvent person applying to the Court of insolvent debtors, or to the quarter sessions, for their discharge out of custody; the s. 41. of the statute has given the barons of the exchequer an independent and discretionary power to discharge insolvent crown debtors, on an investigation of the whole case. *Rex v. Austen and others*, and *Rex v. Lewis*, 9 Pri. 142. See 57 G. 3. c. 117. § 4.

An extent lies against the insolvent agent of a fire insurance company, where it is found on inquisition that he has received a sum due to the crown for insurance duties, though the company be also liable to the crown. *Rex v. Wrangham*, 1 Tyr. 383.

An application to discharge a defendant in prison under an extent for duties in his hands, being a part of money received by him for premiums and duties on

policies, as agent of an insurance company, on the ground of his having been arrested by the office for the whole balances due from him to them, including such duties before the extent issued, as to which debt he was afterwards discharged under the insolvent act, refused, by discharging a rule to shew cause; the Court holding, that such a ground raised a question of merits which could not properly be brought before the Court but by traversing the inquisition; and that they could not set aside an extent *quia improvide emanavit*, in motion, on a statement of such facts by affidavits would amount to a reference. *Rex v. Seton*, 8 Pri. 671.

Priority of, to, *fi. fa.* *Quære*, Whether goods seized by the sheriff under a *fi. fa.* at the suit of a subject, are protected against an extent tested and issued after the seizure but before sale. *Giles v. Grover and another*, 1 Y. & J. 232.

Goods seized under a *fi. fa.* at suit of a subject, are before sale liable to be taken by extent, tested after delivery of the *fi. fa.* to the sheriff. *Rex v. Wells*, 16 East, 278. n.

Recognized in Exchequer as a solemn decision and being uncontradicted by later authority, though at variance with former determinations of other Courts (e.g. *Uppam v. Sumner*, 2 W. Bla. 129. *Stacey v. Hale*, 2 Doug. 411.) not suffered to be questioned on an interlocutory motion. *Rex v. Sloper and Allen*, 6 Pri. 114. *Wood B. dub.*

And see *Rex v. Osbornes*, 6 Pri. 94. *Rex v. Drew* (Sheriff), 1 Chit. 643. See *Rex v. Giles*, 8 Pri. 398; *infra*, p. xl.

The latter part of s. 74. of 33 H. 8. c. 39. applies only to cases where the goods of the debtor are not only taken in execution but sold, the property in them not being altered till then, and that until the property be altered and transferred absolutely from the debtor, by sale and delivery, the crown's execution is to be preferred, even where the crown process is so awarded. *Rex v. Sloper and Allen*, 6 Pri. 114.

Where a landlord has distrained for rent arrears, and the tenant has replevied the goods, and has sold a part on his own account by permission of the landlord, if in the mean time the remainder are seized under an extent tested after the distress for a debt due to the crown, which is satisfied thereout, according to the exigency of the writ, this Court cannot, in the exercise of its equitable jurisdiction, interfere to enlarge the time for the return of the process, that the sheriff may in the interim proceed under it against the defendant's lands, for the landlord's indemnity, on the ground that the defendant had not, pending the distress, in point of fact, deeds and chattels sufficient to satisfy the crown's debt, or in any way use the crown process in favour of the landlord under such circumstances, and principally because on the levy having been made the writ would be *eo instanti functus officio*. *Rex v. Hodder*, 4 Pri. 313.

Where a moiety of the forfeiture in a penal action is vested by judgment in the crown, it has priority of process. *Cawthorn v. Campbell*, 1 Anst. 221.

An immediate extent and extent in chief is the second or any degree, are to be satisfied before an extent in aid of a prior teste, where the same goods were seized under both extents, though the inquisition on the latter was taken before that on the former, and on the same day as the inquisition under the immediate extent and the *venditioni exponas* on the extent in aid was tested before that which issued on the extent in chief, in the particular degree. *Rex v. Loring*, 8 Pri. 683.

An extent sued out on the affidavit of one of the partners in a firm, against whom an extent has issued in chief, containing the usual averment under Reg. 15 C. 1: is notwithstanding not an extent in aid, but an extent in chief, in the particular degree, and entitled to the prerogative preference in execution due to

late extents, or extents in the first instance.

is not necessary that the crown in proceeding to the debts of its debtor by extent within the degree, should first apply the immediate debtor's effects in discharge of its debts before resorting to the debtor's debts. So held in a case of two counts extents by two revenue boards; one in chief second degree, and the other in aid, the latter first obtained execution of the *venditioni exponas*, both in fact proceeding for the benefit of the crown. *Larking*, 8 Pri. 683.

EXTENT IN AID.

general.] Bond to the crown, though not for, is sufficient to entitle the obligor to an extent. *Rex v. Mainwaring*, 1 Pri. 202. but see 3. c. 117. §. 4. *post*, APPENDIX No. IV.

A rule of court not indispensable, that the affidavit should contain an allegation that the debt is trust debt. S. C.

A court will not set aside any part of a record or an order, nor order a replication to a plea to an extent to be struck out because not consistent with, or least not pursuing the facts stated in affidavit which the first was granted. Thus where an extent in aid had been issued on a fiat founded on an affidavit, stating that the prosecutors of the extent jointly and severally bound by writing obligation to the crown, conditioned for the returning all the money which they should receive from the debtor of excise, which bond was still undischarged, that they were indebted to his Majesty for money received by them from the collector for his Majesty's use: the defendant having pleaded that they were not indebted to the crown at the time of issuing the extent, by receipt of any money for the use of his Majesty, and for the answering, &c. of which they were bound to the king by their said bond. The king's general replied, 1st, affirmatively in the answer of the plea; 2ndly, that the prosecutors of the extent did not pay to the commissioners of the excise any money considering the proceedings to be so framed, for the purpose of unduly obtaining an extent, which was not supported, the defendant would be proceeded by the court who could stay the proceedings, and on application by the defendant, the court recollect that this motion had been made. *Barbery*, 10 Pri. 46.

ho entitled to.] The court refused to grant a writ for an extent on an application made by a committee of a lunatic against a preceding commitment in the usual bond to the crown, where he had declared bankrupt under a commission of bankruptcy issued against him so long as ten years before application. *In re Lacy*, 10 Pri. 135.

The party's remedy is by *scire facias*. S. C. An obligor to the crown by bond, conditioned to deliver such sugars as shall be delivered to him, as for the sale and disposal of certain sugars, and to count for and pay over the produce of the sale of said sugars to, &c. may sue out a writ of extent in aid under the proviso in the 57 G. 3. c. 117. on a debt due from him to the crown, being a balance of monies received by him between the date of his appointment and the time of issuing the writ, arising from the sale of sugars delivered to him after his appointment, and previous to the date of the bond. *Rex v. Kynaston*, 11 Pri. 598.

A debtor of the crown may gain a priority for his demand before other creditors by extent, though sworn that the crown is in no danger, nor have court discretion to prevent him. *Rex v. Blatchford*, 1 Anst. 162; but see now 57 G. 3. c. 117. § 4. APPENDIX No. IV.

and *Reg. Gen. Trin.* 1822, as to Affidavit of danger, *ante*, and *post*, xl.

A manufacturer liable to excise duty on the articles made by him growing due from day to day, was held entitled to an extent in aid. *Rex v. Williams*, 3 Pri. 80. but see now 57 G. 3. c. 117. §. 4. *post*.

An immediate debtor to the crown, indebted by reason of his receipt of the crown's money as a country banker, to whom it had been paid by a district collector of excise for the purpose of being remitted by him to London, is not entitled (though he shall have entered into the usual bond to the crown to pay over the money or remit good bills for the amount within 21 days after receipt of it) to sue out an extent in his own aid unless there has been in fact a literal breach of the condition; such breach to be stated in the affidavit for obtaining the fiat for the extent. *Rex v. Tarleton*, 9 Pri. 647.

If there has been no breach of the bond, obligor can only obtain an extent on a commission and inquisition to find a debt due to the crown as in the ordinary course of proceeding with respect to simple contract creditors of the crown. S. C.

Bankers having money in their house arising from the assessed taxes paid in for the purpose of being paid over to the exchequer on account of a receiver general, for due payment of which by him they have given bond to the crown, may still sue out an extent in aid, on affidavit stating generally their having received the money for that purpose. Nor is it necessary that they should shew in the affidavit made to obtain the fiat that they are not precluded by 57 G. 3. c. 117. from using the crown process, *e.g.* that being sureties they have been called on by the crown on account of the default of their principal or in any other respect. *Rex v. Gibbs*, 7 Pri. 633.

In reckoning the degrees allowed for proceedings in aid, the king's debtor is not to be counted. And the sheriff may return and seize the debts due to the debtor in the third degree. *Rex v. Lushington*, 1 Pri. 94.

The surety in a bond to the crown by a maltster, for securing the payment of duties on malt made by him, is not such a debtor to the crown as is entitled to prosecute an extent in aid; because, by the special condition of such bonds, the duties are not payable till four months after the maltster shall have made entry, according to the 48 Geo. 3. c. 74. s. 23. *Rex v. Sly*, 2 Pri. 167. (and see 57 G. 3. c. 117. §. 4.) *post*.

It is not necessary that the bond on which the inquisition proceeds, should be actually produced. S. C.

The process of extent issues of common right if well founded. S. C.

A debt due to the crown for duties payable in respect of post-horses, income tax, stage coaches, and assessed taxes, was not a debt of such a nature as before 57 G. 3. c. 117. entitled the crown's debtor to an extent in aid, against his own debtor. Nor would a baron if aware of the nature of such debt, grant a fiat; or, if by inadvertence he did, the court set it aside in a subsequent stage, *quia improvide emanavit*, without requiring the defendant to plead. *Rex v. Wilton*, 3 Pri. 368.

A brewer indebted to the crown for excise duties, entitled to an extent in aid. *Quere*, whether the affidavit should not state some act from whence the fact of the defendant's insolvency might be made appear. *Rex v. Rippon and another*, 2 Pri. 398. but see 57 G. 3. c. 117. §. 4. *post*, APPENDIX No. IV.

Reg. Gen. 6 Car. 1. that no debts, without speciality, shall be found by inquisition for debts in aid, unless it be by order on motion in open court, or unless it be for debts due to the king's farmers, not to be limited to a confined construction of persons answering the description of *king's farmers*, but

is to be extended to all persons becoming accountable to the crown for money belonging to the public in their hands. The rule of the 3rd of Will. 3. that fiats shall not be granted on a simple contract debt in vacation, unless by order of a baron, held not to be intended to infringe the authority of the chancellor of the Exchequer to sign such fiats. *Res v. Mowbray and others*, 2 Pri. 13. but see 57 G. 3. c. 117. § 4.

What may be taken under.] The doctrine of crown process having priority where it bears teste on a day subsequent to a subject's execution on a *fi. fa.* under which the sheriff has seized, applies to cases of extents in aid. *Res v. Sloper and another*, 6 Pri. 144. See in general *Res v. Lamb*, 13 Pri. 649.

Quere whether an assignment made by deed for benefit of creditors by a party whose goods were at the time in possession of the sheriff, having been taken under a *fi. fa.* a writ of extent coming to the hands of the sheriff after assignment executed, and before the goods were sold, and whilst the sheriff and landlord were in possession—was available to pass the property professed to be assigned. *Res v. Evans*, 9 Pri. 366.

A parcel made up by a banking-house sealed and addressed to another banking-house, containing cash notes and checks of the latter, and bills of exchange specially indorsed to the former to make up a balance due from them to their general account, and deposited on 3 July after the bank was shut with a woman servant, left in care of the banking house, to be given to the postman in the morning of the 4th, who was in the habit of calling for such parcels before banking hours. Held to be seizable under extent in aid tested 2nd July and returnable 6th Nov. and that although the inquisition finding the debt due to the debtor of the crown debtor, was not taken till 4th Nov. following: because the circumstances did not amount to a delivery of the parcel to the persons to whom it was addressed or their agent, and therefore conferred no right of property, the contents remained in the banking house at the risk of those who made up the parcel and were still under their controul. *Secus*, if it had been delivered to the postman. *Res v. Lambton*, 5 Pri. 428.

Priority of extent in aid to fi. fa.] An extent at the instance of the crown against the debtor of the king's debtor, being both tested and delivered to the sheriff after a seizure by him in execution under a *fi. fa.* of the goods of the party on a judgment recovered at suit of a subject creditor, attaches upon the property in the sheriff's hands, while they remain unsold in virtue of the king's prerogative right of priority in execution of the crown-process. *Giles v. Grover and another in re Rex in aid of Grover v. Giles*, 12 Pri. 2. See 1 Y. & J. 232.

Where the sheriff seized goods, &c. of a defendant under a *fi. fa.* sued out on a judgment recovered at suit of a subject creditor, and after the seizure, but before sale, an extent in aid issued, tested after the seizure, and founded on a commission to find debts dated, and an inquisition taken thereon, the same day as the teste of the extent was put into the sheriff's hands to be executed. Held that the extent attached on the goods so taken while remaining unsold in the sheriff's hands. *Res v. Giles*, 8 Pri. 293.

Dissentiente Wood, B. on the ground that as the *fi. fa.* had been in fact and in law executed by the seizure, the crown process coming to the sheriff after seizure, was too late because the property was altered and divested out of the debtor on seizure by the sheriff which is the perfecting of the execution, the subsequent sale being merely a formal part of the sheriff's duty. S. C.

Quere, in what stage of the execution the property in the debtor's goods is divested out of the debtor, and transferred to the judgment creditor? or when an execution may be considered as executed? S. C. See *Att. Gen. v. Fort*, 8 Pri. 364. n.

Effect of before inquisition taken.] An extent at the suit of the crown against the debtor of its debtor has not before inquisition taken, the effect of divesting the crown debtor's right to sue his debtor, or to receive the debt. An action commenced after an extent issued against the debtor of a crown debtor, but before the taking of an inquisition under it, and proceeded in by the assignees of the plaintiff, (who had in the mean time become a bankrupt) in his name, after inquisition taken, and the debt so sued for had been seized under it into the hands of the crown, and an *amoveas manus* issued, on the application of the bankrupt after issue joined. Held to have been well proceeded in, and the court discharged a rule for setting aside the verdict obtained, and entering a nonsuit, which had been granted on the ground that the plaintiff had no right to continue the suit under such circumstances. *Lakeman v. M^r Adam*, 8 Pri. 576.

Title of third persons claimants.] Parties claiming goods which have been found by inquisition to be the property of a defendant under an extent, must shew title in themselves, and cannot unless that title be admitted on the record, object on the demurrer to the proceedings upon the extent. *Res v. Smalby and others*, 1 Y. & J. 249.

Quere, whether upon an inquisition, a verdict for penalties is legitimate evidence of a debt due to the crown. S. C.

PROCEEDINGS ON EXTENTS IN AID.

Affidavit of danger in order to obtain fiat, under 57 G. 3. c. 117. § 4.] It was ordered by the court of Exchequer, *Trin.* 1822, that no fiat for an extent in aid should be thereafter granted unless the party applying for the same or some person or persons on his behalf should make affidavit, "That unless the process of extent for the debt due to him from his debtor he forthwith issued the debt due to the crown from the party applying, would be in danger of being lost to the crown." *Reg. Gen.* 11 Pri. 160.

The stat. 59 G. 3. c. 117. does not extend to extents in aid commenced before it passed. *Res v. Sloper*, 6 Pri. 144.

Affidavit of danger in order to obtain judge's fiat for an extent in aid, is not legal evidence to support an inquisition under the extent. *Res v. Hornblower*, 11 Pri. 29.

Other affidavits for obtaining extent in aid.] The allegation required to be made in the affidavit to found an extent in aid, that the debt has not been sued for in any other court, cannot be dispensed with; nor can the crown's accountant be permitted to abandon another mode of proceeding previously elected by him for the recovery of his debt, for the purpose of enabling him to make that allegation. The crown's debtor cannot have a *diem clausit extremum* in aid after the death of his debtor against the estate, unless the debt have been found in the lifetime of the deceased. *Hippesley, Ex parte*, 2 Pri. 379.

The affidavit made to obtain the fiat of a baron for an extent, need not contain any allegations tending to shew that the party on whose behalf the application proceeds, is without the restraining provisions of 57 Geo. 3. c. 117; or that it should set out the condition of the bond for that purpose. It is enough that the baron be satisfied that there is ground for granting a fiat for the extent. The statute does not require that such a course should be adopted, nor has

ected in any respect the old practice observed in preliminary matters. *Rex v. Dinley*, 9 Pri.

here a crown debtor is entitled to an extent in by the practice of the court, it is not necessary he should have the sanction of the revenue officers, or of the officers of any of the revenue boards. *57 G. 3. c. 117.* a manufacturer liable to duty of excise on the articles made by him growing from day to day, was entitled to an extent in although he gave no bond to the crown, but it so now. See § 4. The crown is entitled to extent against such persons, immediately on the as being manufactured, although not charged such duties. *Rex v. Williams*, 3 Pri. 76. The *ex capias* clause of the writ of extent is not unenforced: and where there have been also effects sufficient to satisfy the debt, the court seemed to order the discharge of a defendant taken in, on his giving security for his appearance at return of the writ. *Rex v. Plaw*, 3 Pri. 94. See *Mares*, 2 Pri. 151.

where the produce of the sale of an estate under extent which is subject to a mortgage, has been into court, there must be a reference to the de-membrancer to ascertain what is due on the mortgage. *Rex v. Coombes*, 1 Pri. 207. See post, xlii. The court will not give a defendant leave to traverse an extent in aid who has let the time for pleadings without doing so, on failure of motion to set the proceedings. *Rex v. Gibbs*, 7 Pri. 633.

A defendant cannot enter a claim and traverse an extent after motion to quash the proceedings on writs which were satisfactorily answered. *Rex v. G. 4 Pri. 323.*

Where the defendant has obtained time to plead to an extent, he cannot take any objection to the affidavit which it is founded by motion. The proper plea is to craveoyer and demur. *Rex v. Rippon*, 3 Pri. 38.

Where an inquisition on a writ of extent, it was found that the defendant's property had been seized by the sheriff in part sold under several writs of *fi. fa.*; and that of them had also been taken under distress at; that before the extent issued, but after under *fi. fa.* and entry by distress, and while the property was in the sheriff's possession, defendant set it by indenture to the claimants, on trust for the benefit of his creditors, who might choose to benefit thereof: and the sheriff thereupon returned that he had also seized the same property into his hands, under and by virtue of the writ of which had issued and come to his hands sub- ject to the seizure under the writs of *fi. fa.*, and by distress; and that he held the same money arising by the sale subject to legal claim.

The assignees claiming the property, pleaded an indenture of assignment, and averred that after the deed made, and before issuing the extent, defendant had, and claimants took possession of the property under the deed, and that at the time of issuing the extent they were entitled to, and possessed of, the property upon the trusts, &c., and that the said indenture was made *bonâ fide* and without fraud for the benefit of the creditors. *Rex v. Evans*, 9 Pri. 366.

Where the claimants to that plea by the Attorney General, claiming the possession by and title of the assignees in terms of the plea, were held specially de- fective as traversing an immaterial averment of fact. Held also, that an inducement to some replication alleging the fact of the sheriff's seizure at the time of making the indenture, &c., made by the inquisition, did not cure the infirmity of a subsequent traverse to the same replication of the possession by the assignees. S. C. Where an inquisition on an extent in aid, it is suffi-

cient that the prosecutor of the extent be found to be indebted to the crown (generally) at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accruing due. *Rex v. Franklin*, 5 Pri. 614.

Therefore if an inquisition find the crown-debtor indebted in a sum certain for duties, &c. due between two given periods, and on the trial of a traverse of the crown's debt, *modo et formâ*, it be proved that the debtor was indebted at the time of the inquisition in a different sum for duties accruing for a different period, it is not a fatal variance; for the allegation of the amount of the debt, and of the period for which it was due, is not of the substance of the issue, and may be rejected as surplusage. It is enough if there be any debt in fact due to the crown at the time of taking the inquisition to sustain the proceedings; for the being indebted to the crown is the basis of the extent. S. C.

The court will not interfere to assist a purchaser, for valuable consideration, of an estate seized under an extent against the vendor, for which he has paid the principal part of the purchase-money, and offers to pay the remainder to the crown, or to give up the estate, on satisfaction made to himself. Such things are matter of arrangement, and can only be effected by the consent of the crown. *Rex v. Holtier*, 2 Pri. 394.

A defendant taken into custody under an extent in aid (the sheriff having also seized his property, being more than sufficient to cover the demand), was ordered to be discharged. *Rex v. Kinneer*, 3 Pri. 536.

Where his property (seized and returned) is ordered to be restored to him on his giving approved security, and it is delivered up by the sheriff before the security be approved, the remedy must be against the sheriff for not having the property forthcoming, not against the party for not having such security. S. C.

The court, on application of claimants, will, by rule to show cause, order a *venditioni exponas* to issue before the due time arrive for selling the goods of a bankrupt seized under an extent, on an affidavit that it would benefit the bankrupt's estate, because the price is expected to fall, &c., the sheriff to pay the prosecutor's demand into the hands of the deputy remembrancer, to the credit of the cause, and the remainder to the assignees, the defendants (the claimants) paying into court 100*l.* beyond the amount of the debt claimed by the prosecutor. *Rex v. Cripps and others*, 3 Pri. 606.

If a greater sum than is actually due, and costs, have been levied under an extent in aid out of personal effects, the court will, on motion, order the surplus and costs of the proceeding, which have been so levied, to be refunded to the defendant, together with the costs of such an application. *Rex v. Edwards*, 1 Pri. 448.

The court will order the residue of the proceeds arising out of an extent after the demands of the crown have been satisfied, to be paid into court to the credit of the cause (the crown and sheriff consenting), and in particular cases they will order that the amount be laid out in the purchase of exchequer bills. *Rex v. Freame*, 1 Pri. 299.

Where, on a judgment for the crown, in an action for penalties, an extent was issued, and a levy made by the sheriff, and whilst the money levied was in the sheriff's hands, the defendant brought a writ of error; the court, on application, ordered the money to be paid by the sheriff to the officer of the crown, notwithstanding it was objected that if the judgment were reversed, the party would not be able to obtain a writ of restriction, but would be driven to a petition of right: the court holding that the crown could not

be placed in a worse situation than a subject under similar circumstances; and that the court could not take notice that greater difficulties existed in obtaining restitution from the crown than from the subject. *Rex v. Burns*, 1 Y. & J. 579.

The landlord of premises on which goods have been seized under an extent in aid, is not entitled, under 8 Ann. to call on the sheriff to pay twelve-months' rent, due before the date of the writ. *Rex v. De Caux*, 2 Pri. 17.

Where an extent had issued in aid of a company not incorporated, and the inquisition found that their debtor "was indebted to L. & H.," two of the company who had executed the usual bond to the crown as taken from joint insurance companies, under 22 G. 3. c. 48, on behalf of themselves and the company, "and the other partners and proprietors of a certain society called," &c.: Held sufficient, on motion in arrest of judgment, and that all the individual members of the company need not be named. *Rex v. Ramsbottom and others*, 6 Pri. 447. *Ramsbottom v. Rex in Error*, 7 Pri. 570.

A recital in a writ of extent, that "two persons are indebted" to the crown by bond generally, is sufficient to authorize a command to the sheriff to inquire of debts due to such two persons "on behalf of themselves and a certain society, called," &c. S. C.

Where the crown debtor has debts due to him jointly with others who are not debtors to the crown, and would therefore not be entitled to the crown process; an extent may issue for such joint debts. S. C.

An inquisition returned, finding special matter, without drawing and stating some conclusion as a fact, is bad, and will be quashed on motion, e.g. if it find that money arising from the effects of A. had been placed in the hands of B. a banker, as the property of A. by C. and D., his assignees, under a commission since superseded; but that A. was then indebted to B. in a larger amount than the money so placed in his hands, which still remains owing, unless B. has a right to retain the same towards discharging the said debts. *Rex v. Sherwood*, 3 Pri. 269.

Quere, Whether a set off can be pleaded against a claim enforced by extent? S. C.

Where the inquisition has been so quashed, it is necessary to issue a new writ, the former having been returned. S. C.

Where a *viere facias*, founded on an inquisition, misrecites the inquisition, and therefore fixes by such recital, a day on which the debt had been found to be due, differing from the same day named as in the inquisition, the Court will give leave (on cause being shown) to amend the writ, on payment of the costs, &c. even after the defendants have pleaded. *Rex v. Scott*, 4 Pri. 181.

A plea to an extent in aid, stating that defendant had accepted a bill drawn upon him by the original debtor, and which did not become due till the day after the inquisition was taken, is good, although the defendant had refused payment, and the original debtor to the crown had been obliged to take it up. *Rex v. Dawson*, Wightw. 32.

The Court will not give judgment as if the plea were confessed, for defendants (claiming as assignees, the goods of a bankrupt seized under an extent) on motion for that purpose, where the attorney-general has not demurred, replied, or otherwise proceeded.

Semble, however, they would grant a writ of *amoveas manus* in such a case. *Rex v. Evans and another*, assignees, 6 Pri. 480.

Setting aside.] The Court will extend time for assignees to appear and claim, where a question raised by motion to set aside proceedings under an extent, is undisposed of. *Rex v. Hornblower*, 11 Pri. 29.

A *fiat* quashed *quia improvide emanavit*, and the

extent in aid issued thereon, set aside on motion of affidavits, that the inquisition on which the *fiat* was obtained and the extent sued out, was made without *visa voce* testimony to the jury of the existence of the debt, and that they found the debt to be due solely on the affidavit of danger made by the prosecutor of the extent. S. C.

The crown debtor took out an extent against his debtor for a large sum, a small part of which was disputable on his own showing, the extent is not void *in toto*. *Rex v. Sheriff*, 1 Anst. 190.

The claim of an indorser against the drawer of a bill of exchange on non-payment by the acceptor, is an original debt on which the debtor of the crown may sue out an extent. S. C.

Creditors of a defendant in extent in aid, have not such an interest in the property as to entitle them to move to set it aside for their benefit, though joined in the application by the defendant; *sed quia* if they had obtained judgment. *Rex v. Marks*, 2 Pri. 151.

An extent in aid against the body of a defendant, may be issued, though not applied for in open court. S. C.

A rule obtained to set aside an extent in aid, should, in all cases, be served on the crown officers of the department of the revenue to which the prosecutor of the extent is indebted, to give them an opportunity of coming before the court. S. C.

If a party, proceeding by extent in aid, on such a debt due to the crown as does not authorize that process, be at the same time really a debtor by bond also, that does not operate to remove the objection. S. C.

An extent will not be set aside for irregularity, unless the person objecting apply before the sale, under a *venditioni exponas* of the effects which have been levied. S. C.

The rule to claim is not, *per se*, notice of the intended sale. S. C.

The Court will not set aside an extent in aid, on the ground the debt levied under it is of greater amount than the debt sworn to be due from the original debtor of the crown, although the party moved it on the condition of paying the crown's debt. *Rex v. Bannister*, 1 Pri. 394.

Amending.] The Court, on motion opposed by counsel, ordered an amendment of a writ of extent issued to find debts, to be made, by inserting therein the word "second," being the day of the month on which the extent in fact issued, and on which the *fiat* bore date, a blank having been left in the process for the day of the month, which was not supplied, nor was the omission observed till after the inquisition taken thereon had been returned into court. *Rex v. Ashurst and another*, 9 Pri. 483.

On a motion opposed by counsel, the court ordered an amendment of a writ of extent in aid issued to find debts by inserting therein the word "second," being the day of the month on which the extent in fact issued, and on which the first bore date, a blank having been left in the process for the day of the month, which was not supplied, nor the omission observed till after the inquisition taken thereon had been returned into court. S. C.

Leave to amend given to the Attorney-General, on terms of withdrawing replication of *non est factum* and paying costs. *Rex v. Evans*, 9 Pri. 366.

Issuing new writ.] The Court will not grant a new writ of extent of the date of a former tested several years before on the ground that the defendant has been since found to have been further indebted to the crown, and to have had at the time of issuing the first extent, property not then known to have belonged to him, and though his goods and chattels seized and sold under that writ, produced only

as would satisfy but a very small part of the debtor's original debt. But a new writ of process should be issued, which may be done at any time on application to a Baron, where, while the debt is unsatisfied, the defendant becomes possessor of newly-acquired property. *The King v. Ry.* 7 Pri. 238.

Sheriff's levy and expenses—and see *Sheriff*.] The sheriff selling under a *venditioni exponas* is not entitled to deduct any thing, either for expenses or poundage, or to return such a deduction.

must make a return of the whole sum produced by the sale, when the court order it to be paid over, without poundage; and he must move the court for extra allowance to which he may be entitled. *Jones*, 1 Pri. 205.

has no right to levy costs or poundage, or accidental expenses, under an extent, on a simple contract debt; neither has he, or the attorney for the creditor, a right to receive any such costs or expenses, under a compromise in consideration of proceedings, from the defendant, under duress or menace. *Rex v. Tidmarsh*, 5 Pri. 180.

more than the precise debt be received by the creditor under such circumstances, they will be ordered to restore it, and to pay the costs of an application to the court, for the purpose of obtaining to set aside the extent; and an assignee of a bankrupt defendant may be ordered to do so. *S. C.*

on a motion may be made after an application to set aside the extent altogether, which has failed.

the bill of the solicitor, prosecuting an extent for the recovery of a tax collector may be taxed. *Rex v. Gridge*, 3 Pri. 280.

the sheriff is not entitled to poundage upon stamps or duties of a distributor, seized under an extent. *Rex v. Villers*, Wightw. 95.

the sheriff is not entitled to poundage on money found in the crown debtor's possession, under an extent against him.

on money paid by the sureties of a crown debtor, or who has been arrested on the crown process, for to obtain the release of his person.

the sheriff has no authority, under the extent, as to collect debts due to the crown debtor; if they receive such debts, they cannot make it the subject of a charge for poundage on the amount. *Villers*, 3 Pri. 687.

the sheriff is entitled to levy costs, under 43 G. 3.

on an extent against a collector of taxes: and the sheriff's poundage is included in the word *charges*, which may be levied; and it is payable where the money is levied in, before a *venditioni exponas* has issued, although that proceeding is obviated thereby. But if the sheriff is agent of the solicitors for taxes, has received money from the defendant as costs under an extent, or the sheriff has taken any thing for his services, as *bailliff's fees* and keeping possession, the writ will order them to refund. *Rex v. Collingridge*, 280.

the sheriff cannot retain against the crown, a sum of money deposited by an agent of the crown to cover the expenses of a sale by auction, of property seized under an extent and sold under a *venditioni exponas*. *Rex v. A. C. & J.* 140.

the sheriff is not recoverable on an extent in aid under 3. c. 108., although sued to secure the stamp duty on policies of insurance in the hands of an insured agent of the company, and founded on their contract with the crown for the due payment of those policies; and although the debt be of such a nature as to be payable at an immediate extent might have been issued on. *Rex v. Boyle*, 1 Pri. 464.

Amoveas manus.] The court of exchequer will not give judgment as if the plea were confessed for defendants claiming as assignees the goods of a bankrupt seized under an extent on motion for that purpose, where attorney general has not demurred, replied, or otherwise proceeded; but *semble*, would grant an *amoveas manus*. *Rex v. Evans*, 6 Pri. 480. See *Rex v. Hopper*, 3 Pri. 40. *Rex v. Glenny*, 2 Pri. 396.

The Court will not, in exercise of its equitable jurisdiction over extents, grant a writ of *amoveas manus* to release property seized under an extent in aid against a debtor in a more remote degree, on the ground that the debt which had been found on the original commission to be due to the king's debtor, has been subsequently satisfied, by the payment of bills of exchange deposited with him for securing the debt; if it appear that those bills were not the *bona fide* property of the person depositing them, who thereby committed a breach of trust; because the court will consider that the real proprietors of the bills have a paramount claim on the person with whom they had been so deposited, if he has been satisfied his debt by other means. And as between the different debtors to the king's debtor, no one of them has an equitable claim to be relieved from any burden which must consequently fall on some one of the others. *Rex v. Blackett and another, assignees*, 1 Pri. 96.

The Court, on motion for an *amoveas manus*, where the sheriff had seized debts due to the bankrupt at the testate of the writ, and paid to his assignees under a commission of bankruptcy issued after the extent, before the taking of the inquisition, intimated that that was not regularly a subject for summary interference, but ought to be put on the record. *Rex v. Glenny*, 2 Pri. 396.

On an extent in aid (or even on an immediate extent), where goods and chattels of the debtor have been seized to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the crown, the debtor's lands cannot be sold. Under such circumstances the Court will, on motion, grant an *amoveas manus* (by an order to show cause) on the defendants paying into the receipt of the Exchequer the debt without the costs. *Rex v. Hopper*, 3 Pri. 40.

Costs are not recoverable where goods and lands are seized, the goods alone being more than sufficient to pay the debt levied, not even in the case of an immediate extent; and stat. 25 G. 3. c. 36, does not give the crown a right to costs, in cases where it is not necessary to resort to a sale of the lands. *S. C.*

Quere, Whether in the case of lands being actually sold under an extent in aid, the prosecutor would be entitled to costs? *S. C.*

The Court will not grant an *amoveas manus*, to remove the king's hand from partnership property seized under an extent, against one of the firm, in the first instance. The course is, to apply for a reference to the deputy remembrancer, and that he may report an account of the joint and separate property, when an *amoveas manus* may be obtained by consent, on giving security. *Rex v. Koch and others*, 2 Pri. 198.

Appeal to House of Lords in Extents. See *House of Lords*.

FALSE RETURN. See *SHERIFF*.

FINES, AMERCIAMENTS, AND RECOGNIZANCES.

Recognizances *estreated* into the Exchequer may be discharged, mitigated, or compounded by the Court, according to the equity and circumstances of the case. *Quere*, whether the Courts of quarter sessions can now, in any case, since September 1822, send the es-

treats of forfeited recognizances taken before them, or justices of the peace, into the Exchequer. Vide 3 G. 4. c. 46. *Recognizance of Joseph Pellow*, 13 Pri. 299.

The Court, will not, upon an application to discharge an amercement, enter into a disputed question as to the validity of the practice of the Court of Sewers. *Ex parte Taylor and Others*, 3 Y. & J. 91.

Where A. was fined by commissioners of sewers for refusing to be re-sworn upon a standing jury, the Court discharged the fine, it being admitted that it was not usual to re-swear the jury, except upon the issuing of a new commission. S. C.

A fine estreated cannot be applied to pay the expenses of the prosecution, though a part may be remitted by virtue of warrant under prerogative seal before the estreat. *Res v. —*, 2 Anst. 523.

Under circumstances, the Court refused not only to discharge the recognizance of three persons bound for the appearance of one of them, the principal, at the quarter sessions, to answer a charge of misdemeanor, but even to respite it generally till further order. *Re Clark*, 11 Pri. 730.

They also refused to respite process for a longer time than till the following term, considering it a case for suspending process from term to term only. S. C.

A defendant having been committed to prison on a forfeited recognizance, whereby his wife and family are become burthensome to the parish, is not a sufficient ground for the discharge of the defendant from such recognizance. *Res v. Stancher*, 3 Pri. 261.

The condition of a recognizance, returned, filed, and enrolled as of record, cannot be varied by a rule of Court. Where A. entered into a recognizance to pay to the king a certain sum, or such sum as B. should award; and afterwards by rule of Court C. was, by consent of parties, substituted as arbitrator in lieu of B., and C. made his award: Held, that the recognizance was not forfeited by the non-performance of the award of C. *Res v. Bingham*, 3 Y. & J. 101.

The stats. 3 G. 4. c. 46. and 4 G. 4. c. 37. do not oust this Court of its jurisdiction, where forfeited recognizances have been actually estreated into it from an inferior jurisdiction. *Ex parte Pellow*, M'Cl. 111.

Where the Court refuse to discharge a recognizance, they have power to mitigate the penalty. *In re Hooper*, M'Cl. 578.

A person of the age of sixteen is competent to enter into a recognizance conditioned to prosecute on a criminal charge; and if it be forfeited and estreated, the Court will not discharge it, unless a sufficient case for relief be made out. *Ex parte Williams*, M'Cl. 493.

Instances of the exercise of the power of the barons to respite process issued in respect of fines imposed at the assizes upon inhabitants of towns, &c. on presentments when estreated into the Exchequer, upon summary application on reasonable grounds.

Mode of obtaining the order of the Court for that purpose.

Such orders will not ordinarily be made indefinitely or until further order generally, but merely from term to term. (On the lord treasurer's remembrancer's side.) In the matter of a fine set upon the *Inhabitants* of the city of *Norwich*, 11 Pri. 766.

The Court will not discharge the estreated recognizance of a surety of another for the performance of an order of sessions, where in consequence of non-performance of the condition, the act of the principal has subjected a parish to expense, upon motion made on the ground of the poverty of the party only, unless the parish officers will consent to the application.

Nor will the Court, in any case, grant a rule requiring the parish officers to shew cause why a party making such an application should not be discharged. *In re Smith's recognizance*, 13 Pri. 3.

Estreat of forfeited recognizance discharged on petition, under 4 G. 3. c. 10. Operation and construction of that statute with reference to its object, and the nature of the particular case, and the circumstances of the applicant, and what he had already endured in consequence of the forfeiture of his recognizance. *Res v. Cartman*, 11 Pri. 637.

The duplicate of fines, issues, amercements, and forfeited recognizances, required to be delivered into the Exchequer by the clerk of the peace, under 3 G. 4. c. 46. s. 14. must be delivered in on oath. *Ex parte Hodson, clerk of the peace of Cumberland*, 2 Y. & J. 142.

Infancy not a ground for discharging a forfeited recognizance to appear at the assizes to prosecute a felony. *Ex parte Williams*, (forfeited recognizance) 13 Pri. 673.

Compounding] This Court has no jurisdiction, either under 4 G. 3. c. 10. or the standing writ of privy seal, (whereby it is empowered to discharge, mitigate, or compound forfeitures, or penalties estreated into it from other Courts), over recognizances forfeited at quarter sessions, whereof the yearly duplicate, or certificate, required by 3 G. 4. c. 46. § 14. has been delivered into the Court. *Res v. Hewins*, M'Cl. & Y. 27.

Therefore, where a recognizance for appearing and preferring an indictment at a Court of quarter sessions had been forfeited, and certified into this Court; and the forfeiture had been levied by the sheriff of the county, pursuant to 3 G. 4. c. 46. the Court held, they were not authorized to order the discharge of the recognizance, although the justice of peace, before whom the recognizance had been taken, did not comply with section 4, by giving the party bound a written or printed notice of the time and place at which the sessions were to be holden; and the party had applied for relief at the ensuing quarter sessions, which was refused.

The Court still has jurisdiction over penalties, forfeitures, &c., occurring at assizes. *Res v. Hewins*, M'Cl. & Y. 27.

Recognizance of bail, when discharged by crown's neglect to try a revenue information. See *Attorney General v. Bear*, 6 Pri. 89. post, tit. TRIAL, Notice of.

Fines on jurors. See JURY.

Fines belonging to lords of manors. See RENTS.

FIXTURES.

Fixtures demised with a paper mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties upon paper owing by the tenant to the crown, as utensils for the making of paper, in the custody of the tenant, under 34 G. 3. c. 20, § 27. *Attorney General v. Gill and others*, (upon an extent.) 3 Y. & J. 333.

FORMA PAUPERIS.

If it appears that a plaintiff has no meritorious cause of action, the court will discharge an order authorising him to sue *in forma pauperis*—a judgment order allowing a plaintiff to sue *in forma pauperis* must be made a rule in court, before the court will entertain a motion to discharge it.—*See* *semble*, that an action for penalties is not within stat. 11 H. 7. c. 1. *Hawes v. Johnson*, 1 Y. & J. 10.

Where an order was made *pendente lite*, admitting the plaintiff to prosecute his action *in forma pauperis* and an application by the defendant for security for costs and taxation of the costs previously incurred, was made till nearly two years afterwards; the Court refused the application, and allowed a retrospective

ation to the order. *Jones v. Peers, M'Cl. & Y.*

GAME.

An appeal against a conviction, under 13 G. 3. 0, by a magistrate, for illegally killing game, the next sessions may either order payment of the debt or imprisonment; but an order of the justices for confinement for two days during the sessions of a commitment in execution for this offence, must be for three months if at all. The recognition of a surety taken for trying the appeal and paying the penalty with costs on affirmance, is bad, after being estreated was discharged. *Re v. Bell, 3 Anst. 898.*

HABEAS CORPUS.

Habeas corpus will not be granted, to enable a defendant in an information, confined in a country under sentence of another court, for a libel, attend at Westminster to conduct his defence in person. The application should be made to the court by whom the defendant was sentenced. *Att. v. Hunt, 9 Pri. 147.*

A seaman who had been taken from on board a lugger at sea, by the crew of a revenue cutter, landed, and delivered into civil custody, without warrant or authority, and who was, whilst in custody, charged with a *capias* on an information suggesting, under which he was removed to Newby *habeas corpus*, at the instance of the crown, committed thence to the Fleet by this court: ordered by the court to be discharged unconditionally. *The Attorney Gen. v. Golden, 12 Pri.*

A delay which had occurred in making the application, held to be no objection to a motion of this nature in such a case. *S. C.*

Removal of a prisoner for contempt, to take his trial in another county. *Re Welton, 1 Tyr.*

HOUSE OF LORDS.

[*jurisdiction (appellate)*]. An order made by the House of Exchequer, consequent upon a judgment of the House of Lords, in the matter of an extent, upon facts related by the deputy remembrancer to the court, on a notice to him, is not the subject-matter of an appeal to the House of Lords, because (*semble*) it is a proceeding at law, and not in equity, and the House of Exchequer has no appellate jurisdiction in such cases, as they are many of those substantive independent decrees which are from time to time pronounced by the House of Exchequer.

A proceeding by writ of extent, and all proceedings hereon, interlocutory and final, (*semble*) are proceedings at law.

Section 35, c. 35, does not make the order of the court to sell the real property of a crown debtor an appealable proceeding, so as to subject it to the immediate appellate jurisdiction of the House of Lords. A defendant found an appeal to the House of Lords, the party must put his defence upon the record so as to bring the judgment of the court at law, upon which he brings a writ of error, and he may then appeal the judgment of the court of error to the House of Lords: or he should file an English bill (or bill in the exchequer) to establish his right against the crown, when, if he do not obtain a decree in his favour, he may at once present a petition of appeal from the court of equity to the House of Lords.

That a party entitled to proceed by motion to a court of equity under the various statutes relating to such summary applications, is not thereby prevented from filing a bill in equity to obtain the same relief.

appeal, or for other reasons, it should be considered the more advisable course.

Quære, Whether, when a debt, originally on simple contract, recovered by crown process, and brought into court as part of the general fund which was the produce of sale of the lands of the crown-debtor, sold on motion under 25 G. 3. c. 35, can be considered to be proper money of the crown, and to have been legally or equitably appropriated to the crown, on and from the confirmation of the Master's report, finding the crown intitled to a certain proportion of the fund from that time, in consideration of the debt due; and whether the crown is intitled to the accumulation of the dividends, &c. on the amount from the same time? See observations on this case, and reference to authorities, at the conclusion. *Wall and others, Appellants, and Attorney General, Respondent, 11 Pri. 643.*

HUNDRED.

It is not ground of error that the plaintiff (in an action against a hundred, on 41 G. 3. c. 24; and 1 G. 1. c. 5, for recovery of damages for injury done to him by the demolition of his mills by persons riotously assembled) does not allege in his declaration that such demolition was felonious, or that the persons violently assembled, acted feloniously. It is sufficient to sanction a civil action, if it appear from the allegation of the facts done, that a felony had been committed by them. *Beutson and others v. Rushforth. (In Error.) 3 Pri. 48.*

HUSBAND AND WIFE.

See APPEARANCE.

It is not an objection, to an application on the part of a feme covert who has been arrested to be discharged out of custody, founded on the usual affidavit, that the motion was made late in the following term, because such an application does not proceed on a mere irregularity.

Nor will the court order a feme covert making such an application to pay costs, or impose any terms on her, in ordering her discharge, though plaintiff's affidavit state that she was carrying on business on her own separate account, that the action was brought for goods furnished to her in the way of her trade; because the object of the application is matter of right. *Carlisle and others v. Storr, 9 Pri. 161.*

IMPARLANCE.

On declaration in covenant running to great length, this court will grant an imparlance, although the declaration has been filed in time to entitle the plaintiff to a plea. *Smith v. Bulkeley, 2 Pri. 114.*

INFANT.

Attachment for nonpayment of costs by *prochein amy*. *Evans, suing, &c. v. Davis, 1 Tyr. 345.*

INFORMATION.

[*Putting off trial.*] The affidavit made by a defendant in an information for penalties by the attorney-general, to ground a motion for postponing the trial, on account of the absence of a witness, must be minute and circumstantial as to every matter stated. *Att. Gen. v. Tywn, 11 Pri. 229.*

The trial of an excise information was postponed, where the court were not unanimous in considering the affidavit not sufficiently circumstantial. *Att. Gen. v. Dodsworth, 11 Pri. 232.*

INQUIRY, WRIT OF.

Evidence may be given on a writ of inquiry executed in an action for seduction, that the defendant visited at the plaintiff's house for the purpose of paying his address to the daughter with an intention of

ziage. In such a case the Court refused to set aside the inquisition, on the ground of the damages being excessive, 1000*l.* having been awarded by the jury to the plaintiff, although the parties were in a moderate sphere of life. *Elliot v. Micklin*, 5 Pri. 641.

On a motion to set aside the inquisition, on the ground of inadmissible evidence having been received, and allowed to go to the jury, the court considered themselves bound by the sheriff's minutes (verified by his affidavit) of the evidence which had been offered. S. C.

The Court refused a rule, that a writ of inquiry in a case of libel should be executed before the judge at the assizes. *Morris v. Girling*, 1 Anst. 275.

Notices of.] Where the notice of executing a writ of inquiry was served upon the defendant personally, and not upon his attorney or clerk in court, the service was held to be insufficient. *Brooks v. Tile*, 2 Y. & J. 276. *Gillingham v. Waskett*, M'Clel. 568.

Defendant should be served with a copy of the further breaches suggested on the roll, pursuant to 8 & 9 W. 3. c. 11. § 8. previous to the execution of the writ of inquiry. S. C.

But the irregularity of want of notice, and surprise, may be waived by the defendant's going into his case without protesting against it. S. C.

Where the defendant, an attorney who had conducted his own defence, made such a waiver, the court, as an indulgence, consented to set aside the inquisition, and to let him in to a new inquiry on terms (which he declined).

Where the plaintiff suggests further breaches, under the stat. 8 & 9 W. 3. after a verdict in an action on bond, he should serve the defendant with a copy of the suggestion, or he cannot regularly proceed to execute a writ of inquiry of damages, and the irregularity may be taken advantage of at the time of holding the inquisition. S. C. 13 Pri. 791.

Such an irregularity is waived, if the defendant being present, suffer the inquiry to proceed to an assessment of damages; and he cannot afterwards set aside the inquisition on the ground of surprise, unless as matter of indulgence, and on terms. *Ibid.*

Such an application refused, (the defendant declining to accept it on terms) with costs. *Ibid.*

It is no objection to the service of notice of executing a writ of inquiry, that it was left at defendant's house in the country, during his temporary absence from home: nor that such notice had not been entered in the order book in the office of pleas, nor had been served on his attorney or clerk in court in the cause, nor any notice given to either of them, of such entry.

Notice of executing writ of inquiry, does not require the signature of a clerk in court. *Knibbs v. Hopercroft*, 10 Pri. 147.

It is sufficient notice of a plaintiff's intention to appear before the sheriff by counsel, on the execution of a writ of inquiry, that the plaintiff's attorney inform the defendant's attorney of such intention. Had there been no intimation of such an intention, the defendant should have applied to the sheriff to put off the execution of the writ of inquiry. *Elliot v. Micklin*, 5 Pri. 641.

INSOLVENT.

See PRISONER.

Costs of contempt.] A party, who has taken the benefit of an act for the relief of insolvent debtors, is intitled to be discharged out of custody without payment of the costs of contempt of this court, which had been previously cleared, such costs having been included in his schedule of debts. *Evans v. Williams*, M'Clel. 577.

Discharge of debtor to crown under insolvent act. See EXTENT IN CHIEF.

Promise after discharge to pay old debt.] The

Court refused to set aside an execution against the goods of a person, who, having been discharged under the Insolvent Debtors Act, gave a note to his creditor, the plaintiff, for the part of the debt which was not paid under the assignment: holding, that where the remedy is taken away and not the debt, the debt may still be the ground of a future promise or security. *Best v. Baker*, 8 Pri. 539.

Discharge from crown debt.] The act 1 G. 4. c. 119. s. 41. empowers prisoners under writ of *capias* in immediate extents, issued, and remaining in force at the instance and for the benefit and reimbursement of any surety, &c. who shall and may have advanced and paid the debt to the crown, to apply to the Barons of the Exchequer, to be discharged. The provision does not authorize an application for discharge of a prisoner, whose principal has paid part of the debt, and given a warrant of attorney for the residue. *Rex v. Cuming*, M'Clel. & Y. 266.

Plea by insolvent debtor of having been discharged, under 51 G. 3. is not a good plea to an action of covenant, brought against defendant by the assignee of a policy of insurance, for not paying according to his covenant the annual premium for keeping the insurance on foot, which accrued due subsequently to his discharge: it not being such a sum of money payable at a future time, as was contemplated by the legislature on passing the act. *La Coste and others v. Gillman*, 1 Pri. 315.

INSPECTION OF BOOKS, &c.

Where property, and books of account had been seized under an immediate extent in chief, issued against a collector of taxes, and his partner in trade, for a debt to the crown, and a claim had been entered by the assignees of the defendants, who had become bankrupts: held, that the assignees were entitled to an inspection, and copies, &c. of the books, previous to the trial of the issue between them and the crown. *Rex v. Winkles*, M'Clel. & Y. 33.

Of goods.] The Court will not make an order that the witnesses of a defendant claiming goods seized by the customs, may be allowed to inspect them before the trial of the usual information *in rem.* on an affidavit of the party, that he believes he shall be able to prove by such witnesses, that the goods are not contraband, but were made in this country, and, for the most part, by the witnesses, who were required to be allowed to see them. *Attorney General v. Harding and others*, 4 Pri. 381.

INSUPER.

It is not sufficient, that the receiver-general sworn to his account before the 5th of April, to enable him to set insuper upon a parish, unless the account is declared and passed within that time. *Liskard, Borrowed, of, ex parte*, Wightw. 97.

INTEREST.

See DAMAGES.

Paid on bond by executors when to be refunded. See *Smith v. Allsopp and others*, 13 Pri. 823.

The affidavit on which the application is founded for interest on the balance of a banking account from the entering up till the affirmation of final judgment, must state that it was the custom of the bankers to charge interest on their advances, and at what rate. *Gibson v. Carter and others, Bankrupts*, 8 Pri. 516.

Interest allowed by way of damages on an affirmation in error of a judgment in action for money paid. *Doe v. Robinson (in Error)*, 2 Anst. 574.

On a judgment recovered against bankers for a balance due from them of money deposited in their bank by a customer, the court will, on affirmation, order the interest to be added to the damages, where

(a) See now *Reg. Gen.* E. 5 G. 4. *Simons v. Folkingham*, 1 Tyr. 501, and Tidd, 9 Ed. 765. *Redward*

After discharging a rule for judgment as in case of nonsuit, without imposing terms as to costs, a rule will be granted for the costs of not proceeding to trial. *Hockin* (misprinted *Dockett*) v. *Reed*, 1 Tyr. 386.

A defendant having moved for costs for not proceeding to trial according to notice, may afterwards, and in the same term, move for judgment, as in case of a nonsuit, in this Court: but the Court, on a satisfactory affidavit, will discharge the latter rule, on the terms of the plaintiff giving a peremptory undertaking, and paying the costs. *Fisher v. Hodgkinson*, 2 Pri. 90.

An interlocutory motion for discharging a rule for judgment as in case of nonsuit, made absolute with costs, the plaintiff on whose behalf the motion was made having left his home, and being no where to be found for more than a year, the Court ruled the defendant to pay the costs to the plaintiff's attorney under the above circumstances. *Cooper v. Hatten*, 12 Pri. 462.

Rule for judgment as in case of a nonsuit, discharged with costs, where the plaintiff shewed reasonable ground for not proceeding to trial, and had offered the defendant out of Court, a peremptory undertaking to proceed at the next assizes. *Challinor and Another v. Leech*, 13 Pri. 666.

Order for judgment as in case of a nonsuit for not proceeding to trial after a peremptory undertaking, being absolute in the first instance, may be set aside on a motion for that purpose where good cause can be shewn. *Hutchinson v. Hutchison*, 9 Pri. 389.

The rule requiring a term's notice of proceedings, does not extend to a motion for judgment as in case of a nonsuit. *Hockin v. Reece*, 2 Y. & J. 275.

Costs for not proceeding to trial in pursuance of notice, cannot be made a term for discharging a rule for judgment as in case of a nonsuit. *Law v. Travis*, Wightw. 65. See *Hockin v. Reed*, 1 Tyr. R. 386.

Where a plaintiff who knew the insolvency of a defendant, declared on being ruled to do so, in order to avoid the costs of a *non. pros.* and afterwards discharged a rule for judgment as in case of a nonsuit, on a peremptory undertaking to try, the Court refused to discharge that peremptory undertaking. *Cunningham v. Rees*, 1 Tyr. R. 1.

A rule for judgment as in case of nonsuit, will not be made absolute while anything remains due under an agreement between the parties to pay by instalments. *Anon.* 1 Tyr. 378.

Costs for not proceeding to trial and judgment as in case of a nonsuit, may be moved for separately, and in that order, but not otherwise. *Morgan v. Bidgood*, 1 Pri. 61. See *Hockin*, (misprinted *Dockett*) v. *Reed*, 1 Tyr. 386. *contra*.

The Court in discharging a rule for judgment as in case of a nonsuit obtained for not proceeding to trial after issue joined, where the plaintiff gave as a reason for not proceeding, that a suit in equity was then depending between defendant an administratrix, and the representatives of the deceased partner in trade of the intestate; and stated that the suit having been compromised, he was desirous of bringing the action to trial, ordered it on the terms of the plaintiff giving a peremptory undertaking and paying the defendant the costs of the present application, refusing to order the costs to abide the event of the cause. *Coombe et Uz. v. Mines, Administratrix, &c.*, 8 Pri. 94.

Costs on discharging rule for judgment as in case of nonsuit. It is not an inflexible rule in Exchequer, that an order for judgment as in case of nonsuit, for not proceeding to trial according to notice, cannot be discharged upon a peremptory undertaking, but on terms of paying costs. *Grant v. Kearney*, 12 Pri. 529.

Where a motion for judgment as in case of nonsuit,

for not proceeding to trial (the notice having been countermanded) is discharged on a peremptory undertaking, the defendant is not in all cases entitled to the practice of this Court to the costs of the application as of course; and where the plaintiff gives a *non. pros.* for not having proceeded, the costs will be ordered to abide the event. *Brown v. Towner*, 13 Pri. 141. *McCl. 593. S.C.*

Where the rule for judgment as in case of a nonsuit, is discharged on the plaintiff's peremptory undertaking, no sufficient reason having been given for not proceeding to trial pursuant to notice, the defendant entitled in this Court to the costs of the application. *Birdwood v. Hart*, 6 Pri. 202; but see *ante*.

The costs of a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, must be paid by plaintiff, whether the notice be countermanded or merely continued, for in both cases defendant has a reason for coming to the Court, the facts stated by plaintiff may be verified by affidavit. *Hunt v. Boorne, Executrix*. *Forrest*, 3; but see *ante*.

This Court will order a plaintiff showing cause against a rule for judgment as in case of a nonsuit for not proceeding to trial according to notice, to pay the defendant costs, give a peremptory undertaking, and (if the venue has been changed to a county where no assizes are held in the spring) consent that the venue shall be brought back to the original county that the trial may be brought on without further delay. *Ellison v. Coath*, 2 Pri. 16; but see *Grant v. Kearney, &c.*

JURY.

Affidavit of, or respecting juror.] The Court will not interfere to disturb a recorded verdict, on the affidavit of one of the jury, that the amount of damages taken exceeded what they had intended to give. *Marther v. Bailey*, 1 Pri. 1.

The Court will not grant a rule for setting aside a verdict on the affidavit of the failing party, solely that one of the jury was a relation of the second party, and that they were in habits of friendship and intimacy together, and particularizing the various instances and expressions on the part of the juror, of partiality and prejudice which are detailed in the notes of the case. *Onions v. Nash*, 9 Pri. 203. See *Marther v. Bailey*, 1 Pri. 383. tit. *NEW TRIAL*.

Where it is shown to the satisfaction of the Court on a statement of facts by affidavit, that in the return list of special jurors, there are persons non-qualified or exempt, or that from other causes, it is clear that there are less than twenty-four effective jurors remaining on the panel, and that it is probable that sufficient number cannot be had to attend to the trial of a pending information, they will, on motion, set aside a new jury to be impanelled. *The Att. Gen. v. Lord*, 8 Pri. 220.

Where the judge who tries a cause by a special jury, certifies that it was a proper case for a special jury, the master must allow the full costs of the trial, where the verdict is found for the defendant. *St. John v. Wick and another v. Clark and others*, 12 Pri. 134.

But were the party summoned, had let his name stand, and was abroad, which fact was communicated to the summoning officer, the Court remitted the fees. *Ex parte Ford*, 1 Y. & J. 401.

So likewise where the summons had by mistake been left at a wrong house, the Court remitted the fees, but required the affidavit of the summoning officer to that fact. *Ex parte Brown*, 1 Y. & J. 401.

A fine, for not attending as a special juror at the court of C. P. at Westminster, having been exacted upon a gentleman, having a house in London and Brighton, but who had resided the twelve months

ing at Brighton, the Court refused to remit it. *See Sir Thomas Clarges, Bart.*, 1 Y. & J. 399.

LEGACY DUTY.

be rule for attachment against an executor, for delivering an account at the Legacy Duty Office, is only. *In re Estate of Vyryan*, 1 Tyr. 379.

LIMITATION OF ACTIONS.

General operation.] The statutes of limitations be pleaded to a *scire facias* issued by the Court, at the drawer of a bill of exchange in the hands of a crown debtor, and which has been seized by the sheriff under an inquisition on the prerogative process, and such a plea was held good on demurrer. *King v. Morrell*, 6 Pri. 24.

the commencement of a suit by information by the Attorney General on the part of the crown, for the recovery of forfeitures under a penal act, must with reference to the statute of limitations, be taken to be the filing of process, and not the actual filing of the petition. *The Attorney General v. Hall*, 11 Pri.

the issuing out of the process is to be considered the commencement of an information within the statute of limitations. *Att. Gen. v. Brown*, Forrest, 110. *See also*, The memorandum on the record is not decisive of the time when the information was issued. S. C.

LOSING A TRIAL.

a trial is not lost, unless judgment of the term is given by the defendant's delay to put in and perfect bail in time. *Bryan v. Knight*, 1 Tyr. 420.

LUNATIC.

See, Whether a bond to the crown, entered into by a committee of a lunatic, in consequence of a decree of the lunatic's estate having been made to him in usual form, under the great seal, be an obligation of the same force and effect as a statute staple, in the 33 H. 8. c. 39. § 50? *Rex v. Lambe*, 402.

MORTGAGE.

the Court will not interfere, under 7 G. 2. c. 20. in an application by the mortgagor, to compel the mortgagee to reconvey the mortgaged premises, where the right to redeem is disputed upon the affidavit. *See* (d. *Fisher*) v. *Bishop*, 1 Y. & J. 344.

MOTIONS AND RULES.

Shewing cause.] The Court will not permit cause to be shown before the day for which the rule is drawn, on the sake of enabling the party to save the rule, and qu. if that be suggested at the time of the motion. *Richards, Gent.*, one &c. v. *Setres*, 3 Pri.

the Exchequer will not allow more than two motions to be made successively by the same counsel, till they have gone through the rest of the bar. 4 Pri.

Enlarged rule.] Upon an enlarged rule, the affidavit must be filed before shewing cause, though it be expressed in the enlargement rule. *Barker v. Richardson*, 1 Y. & J. 362. *See also* *Ar.*

Rule of moving to discharge rule.] It is necessary to give the opposite party notice of an application intended to be made to discharge a rule nisi for leave of the Court. *Raby v. Olenrenshaw and R.*, 11 Pri. 612.

the species of rule is in practice peculiar to this Court, and in this respect differs materially from the rule in the other Courts.

Making rule absolute.] An order to shew cause cannot be made absolute till the next day after that on which cause is to be shewn, even although it have been enlarged. *Solomon v. Cohen*, 9 Pri. 388.

NEW TRIAL.

Granted where plaintiff was nonsuited by the mistake of a witness, in the most material part of the cause. *De Gion v. Dover*, 2 Aust. 617.

There is no rule against giving costs on a new trial being granted, though the verdict was against the opinion of the judge. *Grasley v. Barlow*, 1 Aust. 47.

In ejectment.] New trial of ejectment granted, under particular circumstances in evidence in the cause, notwithstanding the verdict of the jury (for the defendant) was in conformity with the direction of the learned judge who tried the action. Costs ordered to abide the event. *Doe v. Hirst*, 11 Pri. 475.

The Court will, in some cases, grant a new trial of an ejectment, where a verdict has been found for the defendant; as where the lessors of the plaintiff have, since trial, discovered that they had conclusive evidence of a material fact (the marriage of their ancestor) which they failed to prove at the trial, in consequence of mistaking the Christian name of the person to whom the ancestor had been married, and where it is expected that they may be obliged to enter, to avoid a fine intended to be levied before a new ejectment can be brought. But they will only do so on terms of the costs of the former trial, and the application for the new trial being first paid. *Weak d. Burge v. Callaway*, 7 Pri. 677.

Under 20l.] The Court will not entertain a motion for a new trial, where the cause of action is under 20l. *Jones v. Dale*, 9 Pri. 591.

Where the verdict is perverse, the Court will grant a new trial, although the damages given for the plaintiff are less than 20l. *Freeman v. Price*, 1 Y. & J. 402.

The Court will not, where the damages are below 20l. entertain a motion for a new trial in a *Wreck* cause, upon the ground of the verdict being against the evidence. *Bryan v. Jones*, 2 Y. & J. 264.

This Court will not grant a new trial, on account of the verdict being against evidence, where the damages recovered are under 20l., unless the conduct of the jury has been quite outrageous. *Manning v. Underwood*, M'Cli. & Y. 266.

Time of moving.] Where a cause is tried at a sitting in term, a new trial may be moved for within four days after the *distringas* is returnable, though more than four days have elapsed since the trial. *Mason v. Clarke*, 1 Tyr. 534.

Motions for new trials of issues directed from the equity side of the Court, are not subject to rule requiring such motions to be made, within the first four days of the following term; and such applications may be made at any time during the succeeding term, or the sittings after; but they should, in the first instance, be made before the Lord Chief Baron, sitting alone in equity, if they arise out of causes pending before him. *Pulley v. Hilton and others*, 11 Pri. 380.

The Court will order a new trial on questions deciding important rights, where the Judge expressed an opinion on the trial contrary to the verdict, although he afterwards report that he was not dissatisfied with the finding of the jury. *Mount Edgcumbe (Earl) v. Symonds*, 1 Pri. 278.

New trial refused, on account of the agitation occasioned by previous sudden illness of a witness (the attorney for the party against whom the verdict was given), while under examination. *Richards v. Hammond* M'Cli. 170.

The Court will not grant a new trial on the ground of surprise, where the plaintiff applies on affidavits, stating that the defendant's witnesses swore falsely to an acknowledgment by the plaintiff that he had received the money of the defendant, and imputing perjury in that and other respects to the defendant's witnesses, and an avowal of it after the trial. Affidavits of facts, which might have been proved before the jury, ought not, on principles of judicial policy, to be received or acted upon by the Court, on motions for new trials, in any case. The plaintiff, if his application were well founded, should have elected to have been consulted at the trial: a plaintiff cannot be permitted first to take the chance of a verdict, by going to the jury, reserving to himself in case of failure, an alternative in the experiment of an application to the Court for a new trial, on affidavits impeaching the testimony of the defendant's witnesses. *Harrison v. Harrison*, 9 Pri. 69.

The Court will not permit affidavits to be used on a motion for a new trial, which tend to impeach the integrity of the jury. *Hartwright v. Badham*, 11 Pri. 368.

Although surprise be a good ground for a motion for a new trial, and affidavits may be used to establish that ground, they must be conclusive; and the facts in respect of which the evidence creating the surprise was given, must be such as that the verdict may be mainly attributable to their effect upon the decision of the cause. S. C.

If there appears on the whole evidence enough to sustain the verdict found, independently of the facts brought into doubt, the Court will not interfere and order a new trial, although the right be bound. S. C.

If at the trial of a cause, counsel on both sides argue on the effect of an instrument as being in evidence, and it is by mistake never, in fact, produced, after verdict for plaintiff, defendant cannot take advantage of the omission. *Doe v. Perry*, 1 Anst. 266.

New trial granted, where the plaintiff in an action for not carrying away tithes of grass set out, had stated in his declaration that the land was sown with grass; and the evidence was, that the grass was the natural produce of the soil; and the plaintiff had not proved that the tithes had been properly set out. *Hooper v. Mantle*, 13 Pri. 606.

Sumble. Where a sufficient reason for a verdict exists in a material defect of proof by the failing party, the Court will not grant a new trial, though the verdict is against the other evidence in the cause, and the deficiency was not discovered at the trial. *Davies v. Morgan and others*, 1 Tyr. 457.

By practice of the Exchequer, where a new trial is granted, the party who succeeds on both trials is entitled to the costs of both trials; if the rule for a new trial is silent on the subject of costs. *Loader, q. t. v. Thomas*, 1 C. & J. 64.

Rule for new trial made absolute, on the terms that defendant (who had succeeded) should have the costs of both trials if he succeed in the next; if plaintiff succeed, he is only to have the costs of the second. *Pooley Assignee of Syer v. Millard*, 1 Tyr. 260.

In an action on a statute which gives double costs, if a new trial is granted, nothing being said on the subject of costs, the party succeeding on both trials is entitled to double costs of both trials. *Loader, q. t. v. Thomas*, 1 C. & J. 64.

The Court will not order a party who is in prison, applying for a new trial, on the ground of excessive damages having been given against him, to pay the costs of the former trial before the plaintiff's counsel proceeds to shew cause against the rule. *Goode v. Lewis*, 4 Pri. 307.

In case of a verdict taken in the absence of a party and his solicitor, the Court will, in some instances,

order a new trial, if reasonable cause be shewn. *Bowley v. Sheplagh*, 1 Pri. 361.

Arguing rule for.] If no one appear to shew cause against a rule nisi for a new trial on the peremptory order day, the rule will be made absolute. *Parsons v. Nir*, 1 Pri. 312.

A rule nisi for a new trial having been peremptorily fixed for a day in the third term inclusive, after being granted, and not having been then supported, was discharged. The Court refused to open it in the ensuing term, on a suggestion that instructions had been prepared, and intended to be delivered to counsel in the preceding term. *Lawson v. Britton*, M'Cle. & L. 508.

Postponing.] Motion to postpone the new trial of an issue in a tithe suit from the summer to the spring assizes, on the ground, that the application for the new trial of the issue, and the decision of the judge granting the new trial, in which he stated the result on the first trial to be against the opinion of counsel and the learned judge who tried it, had been published in the newspapers, and was likely to influence the jury, especially as it was to be tried by the same judge, refused with costs. *Willis v. Farrer*, 3 V. & J. 381.

NONSUIT.

Where a judge at nisi prius, told the plaintiff's counsel, that unless they called a person as a witness, whom they had not intended to examine, he would nonsuit them; and on that witness being called and examined, did nonsuit them, and the cause acquiesced; a rule for setting aside the nonsuit, and having a new trial, on the ground of misdirection, is not leaving the case to the jury on the evidence, and discharged. *Elworthy and another v. Bird*, M'Cle. 69.

The judge at nisi prius, cannot properly nonsuit a plaintiff, unless he chooses to submit to it, where the main question in his case depends materially on the effect of the evidence adduced by him. The submission to be nonsuited should be express; a nonsuit in such a case was set aside by the Court, notwithstanding the counsel for the plaintiff did not object to the nonsuit, nor intimate a desire that the case should be sent to the jury: one of the Barons, however, being strongly inclined to think that that ought to have been done, and that the tacit acquiescence by such counsel was an obstacle to the application for setting aside the nonsuit. If the tenancy be established by the plaintiff in the action for use and occupation, and thrown on the defendant to shew that the tenancy was afterwards determined, or that the landlord had accepted another person as his tenant. *Howe v. Mann*, 9 Pri. 291.

See JUDGMENT as in case of nonsuit.

In actions for slander.] Where the material part of the words declared on is proved to a jury, the verdict must be for plaintiff, and a nonsuit will not be entered, though on demurrer or motion in arrest of judgment, it might be held, that an action could be maintained on the words proved. *Lumsby v. Ainslie*, 1 Tyr. 217.

NOTICE OF ACTION.

In the notice required to be given to justices and others, under 24 G. 2. c. 44, of actions intended to be brought against them, it is not necessary to name the parties meant to be included in the action, or to express whether the action is intended to be brought against several. *Bar v. Jones and others*, 5 Pri. 168.

A separate notice to each of several parties intended to be used in trespass, is sufficient to maintain joint action against all of them, for acts committed in pursuance of a statute, which provides, that no person shall recover in an action for any thing done by

as thereof, without notice to the defendant or defendants, of such intended action, although none be other persons who are afterwards joined in action, are named in the notice to either of them. In such an action, a deviation from the line decided by the act as the course of an intended canal, not deprive the defendants of their right to a new action brought, on the ground that what was done by them was not done in pursuance of the act. *Ager v. Morgan and others*, 2 Pri. 126.

NOTICE TO PRODUCE.

Notice to produce letters, and copies of letters, all books relating to this cause," is sufficient, and not let in parol evidence of the contents of a letter alleged to have been written nine years before, not produced. *Jones v. Edwards*, M'Cl. & Y. See *France v. Lucy*, R. & M.

NOTICE TO APPEAR.

serviceable process, the notice must be to appear on the actual return day, and not upon the quarto next. *Price v. Davis*, 1 Y. & J. 9.

NOTICE OF TRIAL.

See TRIAL, NOTICE OF.

OFFICERS OF REVENUE SIDE.

Officers of the foreign apposer; clerk of the estreats; troller of the pipe; and the surveyor of the green. In the matter of the Foreign Apposer, 2 Y. & J. 4.

OUTLAWRY.

A personal property becomes forfeited and vested in the king (for the use of the plaintiff) immediately upon outlawry at the suit of the party, as well the suit of the king. Statutes of rules for enlarging the returns to writs in court, and the King's Bench refused the sheriff's enlargement being made on his application, and to his benefit. *Rex v. Cooke* (outlawed), M'Cl. & Y. 16. plaintiff cannot proceed to outlawry in exchequer, court having no process whereon to found such outlawry. *Horton v. Peaks and another*, 1 Pri. 306.

PARTICULARS OF DEMAND OR CHARGES.

A Court will not order a bill of particulars of the demand to be made to be relied on in an information for a writ of duties, to be furnished to the defendant by the attorney general, or other officer of the crown, by way of measure of a similar nature, although the demand cover a space of thirty years, and the defendant have conducted his business at two separate houses, at a distance of twenty miles from each; at least, unless the defendant furnish the most satisfactory ground for such an application. *Att. v. Lambeth*, 5 Pri. 886. A Court will not suffer an application of this nature to stay the trial; and, in the present case, they refused the attorney general, notwithstanding a rule granted to shew cause, to give notice in the mean

time. Whether, on a strong case, satisfactorily made, the Court would not interfere on a qualified application, to assist a defendant to a certain extent.

A defendant is entitled to receive from the plaintiff a bill of particulars of his demand, although he may have refused to make a statement of it before the action was brought. *Att. v. Fellows*, Wightw. 78.

PAYMENT OF MONEY INTO COURT.

Costs on, of, see Costs.

The defendant paid 1*l.* 1*s.* into court, which plaintiff accepted; that is no admission, that the sum accepted is the whole due, and plaintiff is not therefore liable to costs as suing for a sum under 40*s.* *Cadwallader v. Batley*, 3 Anst. 1.

The plaintiff is entitled to costs up to the time of paying money into Court by the defendant, even after a double default to try the cause, and peremptory undertaking given. *Foulston v. Blackmore*, 1 Y. & J. 213.

A plaintiff, after proceedings had, may take out of court the money paid by the defendant, without an application to the Court for that purpose; and by his so doing, all proceedings are stayed. S. C.

Production by plaintiff of a rule, obtained by defendant for payment of money into court, and the master's allocation of a certain sum for costs is sufficient evidence of the plaintiff's election to take the sum paid into court; and if he afterwards proceed for the costs taxed, and not paid, he need not prove a previous demand at the trial. *Smith v. Battorsby*, 7 Pri. 674.

A nonsuit on that ground, set aside. S. C.

Taking out money which has been paid into Court in an action at law, is a breach of an injunction to restrain further proceedings. *Parke v. Earl of Shrewsbury*, 13 Pri. 289.

A motion made by the defendant before answer, for liberty to take it out notwithstanding, and without prejudice to the injunction, was refused, with costs. S. C.

The Court will not order money awarded to a party to be paid into court, on a petition of appeal being signed by the counsel; but *semble secus* if the appeal had been received. *Lewis v. Harbor*, 1 Pri. 131.

PEERS.

A peer may be sued in K. B. by bill, as having privilege of parliament. *Littledale v. Earl of Lonsdale*, 2 Anst. 356.

PLEA, FILING OR DELIVERING.

A plea of outlawry ought to be set down for argument by the defendant. *Chapman v. Lonsdown*, 2 Anst. 554.

PLEADING.

[Case for malicious arrest and prosecution.] In an action for malicious arrest, it is necessary to state the writ. *Gadd v. Bennett*, 6 Pri. 540.

The declaration in an action, for maliciously causing a writ to be sued out, whereon plaintiff was imprisoned, stating the process with the *ac etiam* clause, as sued out for 50*l.* (instead of 30*l.* according to the fact), and an indorsement for 15*l.* the warrant being for 30*l.* constitutes a fatal variance. S. C.

An averment, that the defendant had voluntarily permitted his bill to be discontinued, for want of prosecution thereof, with a conclusion of the record, is not proved by shewing that there had been actually a rule to discontinue, regularly taken out: the record having been averred, it must be proved. S. C.

Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue, and evidence of the payment of costs. S. C.

[Several matters.] The stat. 4 Ann. c. 16. s. 4. giving power to plead several matters, does not extend to actions at the suit of the king. *Rex v. Cadwell and others*, Forrest, 57.

POUNDAGE.

See EXTENT; SHERIFF.

PREROGATIVE.

Prerogative is. that revenue questions shall be

heard in exchequer. *Rex v. Pickman*, 3 Anst. 862. See S. C. tit. EXTENT. *Beningfield v. Shetford*, 8 Pri. 584. See tit. TRIAL.

PRISONER. See INSOLVENT.

Discharge.] A person who has lain in prison above twelve successive calendar months, in execution upon a judgment for damages under 20*l.*, is entitled to be discharged out of custody forthwith as to such execution, on a proper application, under 48 G. 3. c. 123. § 1.; (small debts act) notwithstanding he had previously been brought up under the compulsory clauses of the Lords' act, and had been remanded for not delivering in a schedule of his effects. The 48 G. 3. c. 123. § 1. applies only to cases of persons in execution upon judgments in civil actions. *Langdon v. Rossiter*, M'Cle. 6.

The Lords' act gives no authority to remand a prisoner refusing to give in an account, otherwise than generally. S. C.

If a prisoner be brought up by rule of Court under the compulsory clauses of the Lord's Act, on a day, after the first seven days of the term next ensuing the expiration of the twenty days' notice required by that act, he cannot be called upon to give in upon oath an account of his estate. S. C.

The Court will discharge a prisoner, detained in custody under legal process (capias on an information for offences against the revenue laws) issued whilst the defendant was in gaol, under an arrest which was originally illegal and without authority. And they will not impose any terms on the defendant on ordering his discharge. *Attorney General v. Cass*, 11 Pri. 345.

If a prisoner be brought up to the Court to deliver in an account of his estate, under 32 G. 2. c. 28. § 16, 17, and he refuses, when brought up to do so, the Court cannot order him to be remanded until any future day, and to be then brought up again for the same purpose. They can only remand him, when he will return to prison in the same custody: and therefore if the damages for which he has been charged in execution do not exceed 20*l.* exclusive of costs, and he have lain in prison more than twelve months, the Court will discharge him, under 48 G. 3. c. 123, notwithstanding the compulsory clause of the 32 G. 2. *Langdon v. Rossiter*, 13 Pri. 186. S. C. M'Cle. 6.

Aliter, If he be also in custody under an order which makes his imprisonment in the nature of a criminal custody; for 48 G. 3. applies only to civil custody. S. C.

If a defendant is illegally arrested *s. g.* without writ, and served with process while so detained, the exchequer will discharge him unconditionally. *Barlow v. Hall*, 2 Anst. 461.

RECOGNIZANCE.

See FINEs, &c.

A recognizance estreated by mistake of the officer of a Court cannot be discharged on his certificate without his affidavit. *Rex v. Bolton*, 1 Anst. 79.

RELEASE.

A release of all demands from the plaintiff to the defendant, will not deprive the plaintiff's attorney of his lien upon the costs of an action awarded in favour of the plaintiff; nor can the defendant set off the costs of another action between the same parties, and awarded in his favour against those now awarded to be paid by him to the plaintiff, until the plaintiff's attorney's claim be satisfied. *Gifford v. Gifford*, Forrester, 109.

Where there are several plaintiffs, and one fraudulently gives a release to prejudice the real plaintiff, and that release is pleaded, the Court will set aside that plea, and order the release given, to be delivered up to

be cancelled. *Barber and another v. Richardson*, 1 Y. & J. 302.

But the fraud must be clearly made out, by affidavits of the party seeking to set aside the plea S. C.

Of debt to crown.] Mode of procuring the discharge of a crown debt, (arrear of taxes) and obtaining release from process, where the debt is paid by the crown debtor upon motion by the attorney general. *Rex v. Bennett*, 11 Pri. 770.

REPLEVIN.

Assignment of replevin bond.] A defendant in replevin is not entitled to an assignment of the replevin bond, on the plaintiff's neglecting to declare at next county court, if he himself have not then appeared to the summons. And if he obtain an assignment, and bring an action, the Court will stay proceedings (on an affidavit being made, that a writ of *recordari fac. loquelam* has been sued out), until payment of costs by the defendant, which will be ordered to abide the event of the proceedings on the *fa. lo.* *Seal v. Phillips, and others*, 3 Pri. 17.

REVENUE.

Information, see AMENDMENT.

Venue.] The venue of an information on 34 G. 2. c. 19. for being both tanner and shoemaker, must be laid in the county where the offence was committed. *Att. Gen. v. Ferris*, 3 Anst. 871.

The attorney general may at any time demand revenue information. *Att. Gen. v. Henderson*, 3 Anst. 714.

Pleading in person to information by the crown. *Att. Gen. v. Carpenter*, 1 Tyr. 351.

Information for forfeiture of a ship, two years having elapsed without trial, a writ of deliverance granted on security by recognizance, on affidavit of probable injury to ship by being unemployed. If witnesses for the crown being seamen, absent about three terms intervened without the attorney general proceeding to trial; a rule for discharging the recognizance was however discharged. *Att. Gen. v. Selham*, 3 Anst. 805.

Practice.] Summary application against commissioners of land-tax, to compel a due assessment of the land-tax. *Att. Gen. v. Commissioners of Land Tax*, 12 Pri. 647.

In a case of issues on writ of *distringas* for non-payment of land-tax set inusper. Service of order on sheriff. *Attorney General v. Inhabitants of*, 12 Pri. 649.

Motion for an attachment against parties for obeying an order of commissioners appointed to inquire of debts due to the king, requiring production of papers. *Rex v. Denny and others*, 12 Pri. 649.

Quere. Whether parties in trade against whom commission has issued, to hold an inquisition into whether they are indebted to the crown for arrears of duties of excise on the commodities sold by them in the course of their business, and who, on attachment pursuant of a summons, to be examined by the commissioners on the inquest, refused to submit to examination unless attended by their solicitor, are compellable to produce before them for their inspection the partnership books, for the purpose of furnishing evidence of the amount of duties in arrear, with first being duly released, by competent measures of authority, from any penalties which the containing such books might be the means of shewing or obtaining that they had incurred? S. C.

Qu. By whom, and by what means such inquisition is to be secured to the parties? It cannot be given to the solicitor to the excise, of his own personal

Proceedings for duties withheld and in arrear, *e (semble)* a waiver of penalties. S. C.

as belonging to lords of franchises.] Course of proceeding, in order to obtain the direction of the, requiring the officer of the exchequer called *oreign Apposer*, to set over fines* (by appointment) to lords of liberties, claiming them under grants of royal franchises from the crown. Matter on which applications for such purpose must stand. Notices to be served, and by whom. If the attorney general opposes the application; question of title, or extent or construction of applicant's title, arise, the court will make no order on motion, because it then becomes matter of right against the crown, which must be determined by judgment on matter of record, and must therefore be argued before the court in a more solemn and formal manner, by claiming upon record, to give the opportunity of contesting it by plea or otherwise.

In the matter of the claim of (apportionment of) the Dean and Chapter of the Collegiate Church of Peter's Westminster, 12 Pri. 174.

Of the divisibility of post-fines by apportionment between lords of liberties claiming a fine of lying in two or more liberties; and of the course of proceeding an apportionment by order of the court or otherwise, in such cases? S. C.

Where freehold and leasehold property had been under a writ of *diem clausit extremum*, on an admission and inquisition, and various claims entered on the part of persons insisting on a prior title to that of the king, and the executor of the deceased crown debtor and his surviving partners in and the purchasers of part of his leasehold from his executors and mortgagees, apply by writ to the court (without prejudice to their right to reverse the debt found due to the crown) for an order *as manus* as to the leasehold property; for a reversal as to the partnership property; and a further order as to part of the leasehold estates which had sold, and the proceeds of which had been applied in paying off or reducing mortgages on the other parts of property, the court refused to entertain any part of the application, on the ground that where so many writs were made and points of law were raised, they must not act in a summary way without the consent of the crown. *Rex v. Hodge and another*, 12 Pri.

able, That the parties applying ought to admit that claimed to be due to the crown as an indisputable preliminary, to being heard by the court on merits of the motion. Hullock, Baron, dissenting. S. C.

ere, Whether, and to what extent, and from what time; and under what circumstances, leasehold property of a deceased crown debtor is bound by inquisition and a writ of *diem clausit extremum*. S. C.

How far partnership property is affected by such writ against a deceased partner for a partnership. S. C.

Whether, and how far freehold and real estate of a deceased crown debtor, sold by his executors, is subject to a writ of *diem clausit extremum*, where the proceeds have been applied by them in payment of advances on the other real property of the deceased, and in discharging it from *bond fide* legal claims. S. C.

SCIRE FACIAS.

Against crown debtor, see EXTENT IN CHIEF, PROCESSES ON. *Rex v. Pearson*, 3 Pri. 288.

scire facias against two "that they severally be, appear to show cause, &c. on a bond to the

crown, executed by three, is bad. *Rex v. Chapman*, 3 Anst. 811.

A declaration in *scire facias* against two defendants, on a joint and several recognizance of four persons, without averring the other two to be dead, is bad, without pleading the nonjoinder in abatement. *Rex v. Young and Glennie*, 2 Anst. 448.

A *scire facias* to revive a judgment entered up by warrant of attorney, given to secure the payment of an annuity, and a *fiery facias* issued thereon, are not such proceedings as to call upon the grantor of the annuity to avail himself of an objection to the memorial. *Field v. Coal, Forrest*, 125.

Witness.] Ruled at *nisi prius* by Richards, C. B., that a person having entered into a bond, with sureties to the crown, is not an admissible witness in a *scire facias* against the surety, to prove that he had not broken the condition. *Sed qu?* (the principal having been released by the surety). *Rex v. Horton*, 4 Pri. 150.

SECURITY FOR COSTS.

Plaintiff compelled to give security for costs on affidavit of his residing in Ireland; the cause not having been at issue, and the *venue* laid in Middlesex; and proceedings stayed in the meantime. *Moloney v. Smith*, M'Cli. & Y. 213.

A plaintiff will not be required to give security for costs, or disclose his place of residence, where there is no doubt whether he sues in his own right, and it does not appear that he is out of the kingdom. *Lloyd v. Davis*, 1 Tyr. 533.

Plaintiffs suing in this court, but being resident in a foreign country, out of the jurisdiction, will be restrained from proceeding until they give security for costs. *De Marneffe v. Jackson*, 13 Pri. 603.

The case of *Beckman v. Leirainge* (Anst. 359) denied by the court to be consistent with the present practice. S. C.

Application that a plaintiff should give security for costs, must be made before issue joined, although the issue was joined in the preceding vacation. *Anon.* 5 Pri. 610.

Interlocutory judgment signed for want of plea, set aside on the ground of the proceedings being in breach of good faith, where the defendant had refused to plead till he had got security for costs (the plaintiff residing out of the jurisdiction) the judgment having been signed whilst the parties were in correspondence respecting the sufficiency of such security; although no order of the court had been previously obtained by the defendant for the purpose of compelling security for costs, and the plaintiff had lost by the delay an opportunity of going to trial. *Drury and another v. Johnson*, 13 Pri. 489.

The costs of setting aside the judgment, ordered to abide the event of the suit. It is not contrary to practice in this court, to compel a plaintiff, residing out of the jurisdiction, to give security for costs. On the contrary, the court would make such an order at discretion, as mere matter of justice. S. C.

A plaintiff residing abroad is not compelled to give security for costs in this court. *Beckman v. Leirainge*, 2 Anst. 359. but see *ante*.

Proceedings will not be stayed till plaintiff, who since filing the bill became bankrupt, should give security for costs. *Anon.* 2 Anst. 407.

SEQUESTRATION.

The warden's certificate of a prisoner being in his custody for contempt, for non-payment of costs taxed, is sufficient to found a motion for a sequestration, without any affidavit of demand and refusal to pay. *Phillips and another v. Stephenson*, 11 Pri. 473.

Requisites for issuing sequestration on outlawry of

* "Pro licentia concordandi."

boundless clerk: In re Optatory of N. Hinds, Clerk, 1 Tyr. 347.

SERVICE OF ATTACHMENTS.

Rules for an attachment must be served personally. The court refused to order that service at the dwelling-house, should be deemed good service of a rule for an attachment, upon an affidavit that the defendants were "shy and difficult to be met with," and that the deponent had tried all the means in his power for two months, before he could serve the defendants personally with the award, for the non-performance of which the attachment was sought to be enforced. *Garland v. Goulden and another, 2 Y. & J. 89.*

SERVICE OF RULE OR ORDER OF COURT.

Service of an order of court on a servant of the party, not at his dwelling-house, insufficient. *Anon. 2 Pri. 4.*

Service of all processes intended to bring a party into contempt, should be personal if possible; but if it can be made appear to the court that service cannot be effected personally, and that there was probable cause to suspect that the party kept out of the way for the purpose of avoiding such personal service, the court will grant a rule nisi for an attachment, and order that service, by leaving the rule at the dwelling-house, shall be sufficient. *Weston v. Faulkner, 2 Pri. 2.*

An affidavit of the service of a rule by which it is not intended to bring the party into contempt, need not state that the original rule was shown at the time of service. *Fernstene v. Taylor, 2 Y. & J. 30.*

SERVICE OF PROCESS.

See DISTINGUISH.

A defendant may move to dissolve an injunction for insufficient service of the subpoena, though he has not appeared.

Service of subpoena by leaving the [label, taken away, *Reg. Gen. M. 1830. No. 11.*] copy at the counting-house of the defendant is not sufficient, unless given to a partner or some acknowledged clerk there. *Messias v. Rodrigues and others, 1 Pri. 92.*

A party in custody for a contempt in disobedience of the process of the Court, will not be discharged without an undertaking not to bring an action, when, by his own device, the process had been served, in point of fact, on another person of the same name. *Blund v. Buckley, 6 Pri. 34.*

It is not the practice of this court to serve a subpoena ad respondendum, by leaving the body of the writ with the defendant, where there is but one, as is the practice of the court of chancery. It is sufficient if a copy be left, and the original produced. S. C.

A venire issued against one of several partners who is abroad for a separate debt, cannot be served at the counting house of the partnership.

Where a *quo minus* issues against several partners who are jointly liable, but which cannot be served upon one partner who is abroad, if a venire issues against that partner, it may be served at the counting house of the partnership, and upon his nonappearance a *distringas* may be executed there. *Petty and another v. Smith and another 2 Y. & J. 111; but see 7 & 8 G. 4. c. 71. §5; and Pennell v. Kingston, 1 Tyr. R. and tit. DISTINGUISH.*

Irregularity of service of.] The Court will not set aside the service of a writ for irregularity in being served in a city locally within a county where it was directed to the sheriff of that county, if defendant has waived such irregularity by paying part of the debt and costs, and discharged a rule nisi for setting aside such a writ with costs. *Monday v. Seer, 11 Pri. 192.*

It is not necessary in the *exchequer*, that the affidavit on which such an application is founded, shall negative that the process was served on the *creditor*, or allege that there was any dispute about the *creditor's*. S. C.

SET-OFF.

To debt on bond conditioned for replacing and a set-off cannot be pleaded under 8 G. 2. c. 24. § 1 and judgment was entered up for the plaintiff in an action, notwithstanding a verdict for the defendant on a plea of set-off, the plea being bad in law. *Gillingham v. Wankett, M.C. 198.*

But *quære*? Whether a writ of enquiry, *ex officio* *de novo*, be the proper mode of proceeding to assess damages. S. C.

Particulars of notice of set-off.] In an action an assignee of an insolvent, for goods sold and delivered by the insolvent, the defendant relied on a defence of set-off, and in the notice thereof delivered by him, he set forth a composition deed of assignment to a former creditor of the defendant to the insolvent, which there was a covenant by the latter, guaranteeing to the defendant the payment of a dividend agreed to be paid on that occasion: the notice also stated other grounds of set-off, money had and received, on an account stated; but in the particulars of the set-off the defendant stated the subject matter to be a sum of 344. the amount of the two several dividends of 18 in the pound upon a debt of 481. due from Simon Pail to the defendant, which said dividends are directed to be paid by the said T. L. Pain, as in the said notice of set-off particularly mentioned: Held, that the particulars of the set-off, confined the defendant to prove, of the demand under the covenant in the deed of assignment, as the sole ground of his defence, and precluded him from giving evidence of satisfaction of the demand of Pain, either by money had and received, or an account stated according to the terms of the notice of set-off, or by any other means. And suit directed, on the ground, that the notice of set-off gave sufficient intimation of the sum intended to be set off, and that if there had been no notice of set-off there would have been a good defence by payment of the demand being satisfied, set aside. *Andrew v. Hall 8 Pri. 213.*

Qu. Whether notice of set-off necessary in such case? S. C.

Where a plaintiff has been nonsuited on the ground that a notice of set-off had given sufficient intimation of the sum intended to be set off against the defendant, and that the defendant was not precluded by his particulars of set-off, from entering into a proper counter-demand not stated there; and that demand was afterwards set aside, the Court (considering that he was precluded) and a new trial granted, *where* the second trial the defendant obtained leave to amend his particulars, so as to obviate the objection: and before upon payment of costs, the plaintiff was entitled to be paid the costs of the first trial, previous to and as the terms of the amendment: and the Court would not, under such circumstances, order the plaintiff to review his taxation, on the objection that he had allowed the plaintiff only 21s., the costs of a counter amendment. S. C.

The costs of the former trial, ordered to stand in event of the cause. S. C.

The court, on discharging an order granted in the cause, refused, under the circumstances, to give the successful party the costs of the application. S. C.

Costs.] A motion to set off costs in a suit *ex contractu* for which the plaintiff in the *exchequer* had retained the defendant as his attorney, though he himself was not the party against the judgment there, was granted. *Murphy v. Cunningham, 1 Aust. 271.*

SETTING ASIDE PROCEEDINGS.

be Court will not, on the last day of term, at a rule to shew cause why interlocutory judgment should not be set aside on payment of costs, be not made to appear by the affidavit, that the plaintiff has not lost an opportunity of going to trial. *man v. Day*, 13 Pri. 225.

be Court will not set aside a judgment entered up cognovit, and executed by levying the money, on ground that no process had been actually served on defendant before he signed the cognovit, nor was at time sued out; where it appeared that instructions had been then transmitted to the agent of the plaintiff's attorney in London from the country, to a *quo minus*, which was afterwards accordingly issued, tested of course, after the date of the cognovit. *te and others v. Swift*, 8 Pri. 513.

all motions to annul proceedings, on the ground of irregularity, must be made in the term when the proceedings were had, or the court will not receive the application. *Ann. 3 Pri. 37*.

party having to complain of irregularity, who would move to set aside the proceedings, should come at first instance, if he would secure the costs of application. If he be a defendant objecting to irregularity in service of process, (as a service in another county than that into which it was issued) should apply on the earliest opportunity, and is requested to wait till the plaintiff take a further step; and if he apply in the first instance, and such, the court will give him the costs as almost a matter of course. He may, however, apply, after the plaintiff has taken a further step in the case, in which case the court will award costs in its discretion, where the application succeeds. *Warren, Gent. v. n.*, 9 Pri. 637.

a day on which a defendant is called on to appear, be omitted in the notice attached to *mesne process*, court will set aside the writ, and all subsequent proceedings, notwithstanding the defendant has satisfied a whole term to elapse without giving notice to plaintiff, and does not apply to the court till after execution of a writ of inquiry. *Wickham v. King*, 2 Pri. 9.

the Court set aside a regular interlocutory judgment in ejectment (signed for want of appearance), writ of possession executed, on an affidavit by the reeve for the landlord and tenant, that he had given instructions for entering an appearance, but neglected it, owing to matters personally affecting himself, which had prevented his attending to it. *d. Shaw v. Roe*, 12 Pri. 260; but see *Westerdale Camp*, 1 Tyr. 261.

subpoena ad respondendum, and attachment for want of appearance, in both of which there is a misstatement in the defendant's surname, are not sufficient for a rule to shew cause why the proceedings should not be set aside, although the defendant give plaintiff notice on being served with process, that will move the court to set it aside if proceeded in, tender the plaintiff his demand. *Shaw v. Tytherly* (sued by the name of Tyther Leigh), 2 Pri.

plea in debt that defendant does not owe the said "of ten pounds" above demanded, the aggregate demanded being 60*l*. will not authorize the judgment for want of a plea, for the amount may be rejected as surplusage. *Riadale v. Kelly*, 1 Tyr.

variance from the writ itself in the body of the writ of process, is fatal to the process, and subsequent proceedings. *Morris v. Herbert*, 1 Pri. 245.

on motion to set aside proceedings as *infra dignum*, on an affidavit that the demand sued for does amount to 40*l*. the court will not inquire into the point, if an affidavit be put in on shewing cause,

that the demand exceeded that sum, but will set aside discharge the rule, with costs. *Banker v. Manley*, 2 Pri. 8.

SEWERS, COURT OF.

See FINES, AMERCEMENTS, &c.

SHAM PLEA.

Rules of practice may be departed from in particular cases, when the observance of them would not answer the purpose for which they were made, but would encourage sham pleading. Where the defendant, having pleaded a sham plea, demurred to the plaintiff's replication, merely for delay, and the plaintiff obtained a rule for a *concilium*, for the last day of term, without previously giving a four-day rule to bring in the demurrer books, the court refused to set aside the rule for the *concilium*, but gave judgment for the plaintiff. *Harrison v. Richardson*, M'Cl. & Y. 246.

Where the defendants having pleaded a sham plea, demurred to the plaintiff's replication in order to shift off the cause till the following term; the court refused to set aside a rule, obtained by the plaintiff, on the 10th for a *concilium* on 12th February, without having delivered a demurrer-book to the defendant's clerk in court; no demurrer books having been delivered by the defendant to the two junior barons, nor any by the plaintiff to the chief and senior puisne barons, till the morning of the 10th, and gave judgment for the plaintiff on the demurrer. *Gent v. Vandermoolen*, M'Cl. & Y. 246.

SHERIFF.

Duty, &c. on EXTERIS. See EXTERIS.

Duty in returning process.] An attachment for not returning the writ, was discharged without costs, on affidavit that the defendant was not within the county, and that the return of non est inquest was made too late by mistake. *Saxton v. West*, 2 Ann. 479.

Body rule.] It is not an objection to the service of a rule to bring in the body, that it is stated in the affidavit made to found a motion for an attachment against the sheriff, to have been served on the day of the Purification. *Phipson and another, Assignees, v. Bevir*, Gent. 13 Pri. 208.

Where bail was put in, and perfected on the same day, but after an attachment had been granted against the sheriff, for not bringing in the body, the court refused to set aside the attachment on payment of costs, except on the terms of the defendant pleading *inimmediate*, taking short notice of trial for the sittings after term, giving judgment as of the term, and letting the attachment stand as a security to the plaintiff, in the event of his obtaining a verdict. *Empey v. Bridle*, M'Cl. 83.

Where an order for an attachment against the sheriff, for not bringing in the body, had been obtained on the last day of term, on a rule which expired the day before, the court would not, where there had been delay and a trial had been lost, set aside that order, on the ground of the bail having justified since it was obtained, even on payment of costs. *Empey v. Bridle*, 13 Pri. 262.

They would, however, stay the attachment, on the terms of the defendant pleading *inimmediate*, and accepting notice of trial for the ensuing sittings; and (if a verdict should be given against him), giving judgment of the term, the attachment standing as a security. S. C.

Attachment against, for not bringing in the body, cannot be moved after appearance entered. *Harrison v. —* 1 Tyr. 531.

Terms of staying attachment against the sheriff, for not bringing in the body for irregularity. *Crosby v. Davis*, 1 Tyr. 422. n. *Smith v. Parloe*, id. 423. n.

Body rule.] By raling the sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if at the period when, independently of that rule, the time for justification expires, he take an assignment of the bail bond, for, by so doing, he waives the body rule. (*Bolland, B. dissentiente.*) *Ladd v. Arnaboldi*, 1 C. & J. 97.

If defendant do not justify his bail in due time, and *comperuit ad diem* is pleaded to a declaration on the bail bond, the court will order the appearance of defendant to be recorded as of the day on which the bail justified. S. C.

If a sheriff lets a defendant arrested on mesne process go at large without bail below, and on being ruled to return the writ, returns *cepi*, but no bail is then put in above, the sheriff is liable in an action of escape, and it is not enough that he puts in bail when ruled to bring in the body. *Jones v. Eamer and another*, 3 Anst. 676.

The rule to bring in the body may be taken out and served on the sheriff immediately after he has returned the writ, and on the same day, if the time for putting in bail is then expired. *Gore v. Williams*, 3 Anst. 653.

Bail excepted to and not justifying are still competent to render the principal, while their names remain on the bailpiece. *Ibid.* S. P. *Rex v. Sheriff of Essex*, 5 T. R. 633.

The rule on the sheriff to return the writ expired two days after the end of term; a rule to bring in the body taken out next day, but tested on the last day of term, was held regular. *Buckler v. Blyth*, 3 Anst. 779.

Writ returnable in vacation.] In the Exchequer, if the rule to return the writ expire in vacation, the sheriff must return it at the expiration of the rule, or an attachment may be moved for on the first day of the next term, as in the Common Pleas, because the office of the Exchequer of Pleas is open during the vacation. *Smith v. Blyth*, 9 Pri. 255.

Return to second fieri facias.] A sheriff having returned a levy under a writ of *fiери facias*, cannot return to the *venditioni exponas*, that he has sold the goods, but detains the money for another party, plaintiff under a prior writ of execution; and the court will quash such a return on motion. They will not, after such a proceeding, give the sheriff leave to amend his return. The court discharged an order to shew cause why the sheriff should not be allowed to amend such a return, as being made too late, with costs; but they refused a motion made instant for an attachment against the sheriff, as premature. *Row and another, assignees, v. Trapp*, 9 Pri. 317.

Falsely return.] Where the attorney of a judgment creditor delivered to the sheriff, a writ of *fiери facias* returnable on a day certain, with directions by letter not to execute it till the return, unless another execution should come in, in the mean time, and afterwards sent in an *alias*, accompanied with the same directions; and the sheriff, upon another execution coming in, issued warrants on, and executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly first, out of the money levied, and then paid over the remainder in part satisfaction of the execution first delivered, and returned that payment and *nulla bona* as to the residue; it was held, that the plaintiff could not maintain an action against the sheriff for a false return; and that a nonsuit on that ground had been properly directed. *Pringle v. Isaac*, 11 Pri. 445.

An information in the nature of an action for a false return against a sheriff who had returned that he had seized the goods, &c. into the hands of his majesty, subject to certain prior executions, which return had the effect of depriving the crown of the fruits of

its prerogative, priority cannot be supported if the return should be substantially true, although it may be bad in point of law. *Giles v. The King*, 11 Pri. 594.

The proper course in such a case would be to procure the return to be quashed, by motion for that purpose. S. C.

A court of error will not overlook an objection appearing on the record and special verdict, even when the parties may have so bound themselves, as not to be entitled to insist on the objection. S. C.

Fees—Extortion.] If a sheriff's officer, who arrests a defendant, demand and receive from him a larger sum than he is liable to pay as a caption fee, and for the expense of the bail-bond, &c. the court will, on motion, order it to be referred to the Master to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application. *Watson v. Edmonds*, 4 Pri. 309.

A charge of 2l. 13s. 6d. made on a defendant as a caption fee, wholly disallowed by the Master. S. C.

Liability to pay interest on sum in hand.] Where a sheriff had retained for several years a sum of money in his hands, the balance of the produce of effects of a crown debtor seized by him, and sold under an extent after the crown debt had been satisfied, claiming himself a lien thereon for poundage, &c. the crown ordered that he should pay interest on the amount of such balance to the parties from whom he withheld it, from the time when the court had determined, on a former occasion, that the claim of the sheriff was unfounded, notwithstanding which determination, he had continued to keep the question before the court, and that, although the sheriff should not have made interest or any use or advantage of the money in the mean time, the court proceeding wholly on the ground of the injury done to the party entitled to it. *Rex v. Villers*, 11 Pri. 676.

The court gave the party applying, the costs of the application; but they refused to order the sheriff to pay the costs of former applications, disposed of in respect of the same question. S. C.

Levying after notice.] Where a sheriff, having taken possession of goods under a *fiери facias*, was served with notice not to levy by a person claiming the goods taken, under an assignment, and threatening an action, and the plaintiff had refused to indemnify him, the court gave him ten days to make his return. *Etchells v. Lovatt*, 9 Pri. 54.

Duty of keeping possession.] Where a sheriff has taken possession of goods and chattels under a *fiери facias*, the officer should continue the possession: or if he may abandon it even necessarily for a time, he must clearly account for so doing, if he would sustain his right against others, afterwards claiming under legal authority to seize the same goods. A jury having determined by their verdict upon a question of abandonment, left to them on the evidence, the Court would not disturb that verdict. In case of an abandonment on the return day of the writ, possession cannot afterwards be resumed. *Ackland v. Paynter, and others*, 8 Pri. 95.

Action against.] In an action against a sheriff, for not assigning a bail-bond, the Court will not grant a motion to enter the recognizance of bail, on the record as taken on the same day, (it being always entered generally as of the term), to enable the plaintiff to proceed with his action. *Anon.* 3 Pri. 36.

Qu. If such an action be maintainable? S. C.

Extra allowance to.] Court will grant rule nisi to sheriff, claiming extra allowance, for referring it to the deputy remembrancer to ascertain what he is entitled to.

If inefficient cause be shown against such an ap-

ation, and the deputy remembrancer be attended resist or diminish the sheriff's claim, he is still not titled to the costs of either the application or the defence. *Rex v. Fereday and another*, 4 Pri. 131.

SLANDER.

[These words, "I will take him to Bow-street on charge of forgery," are not actionable, because they not amount to charge the person of whom they are ken with felony. *Harrison v. King*, 4 Pri. 46.]

SPECIAL CASE AND SPECIAL VERDICT.

Smuggling. See *HARRAS CORPUS*.

If counsel on either side appear to argue a special case, on the day appointed by the rule for the conum, and the counsel for the other party do not and, the counsel in attendance will be heard, and the court will give judgment in the absence of the other counsel. And the court will not, on any occasion, permit the case to be opened again for the purpose of giving the counsel who may have been absent, opportunity of arguing it: the necessary attendance of counsel in another court, considered not to be sufficient reason for being absent from this court, the day appointed for an argument here. *Harber Rand*, 3 Pri. 53.

semble, the attorney general has not power to turn special case into a special verdict after argument of special case, no leave having been given for that purpose at the trial. *Att. Gen. v. Dimond*, 1 Tyrw.

STATUTES.

When do not affect the crown. See *Rex v. Osne*, 6 Pri. 94.

[Giving double duties.] The sum found by the jury a count of an information framed upon a statute which gives double duties is to be considered as the whole sum, which is to be doubled by the statute. *Gen. v. Hatten*, *M'Cle*. 214.

STAYING PROCEEDINGS.

On bail-bond. See *BAIT-BOND*.

Action on judgment will be stayed on payment of money due thereon and costs, without interest. *mas v. Edwards*, 2 Anst. 558.

The court will not stay an action of trespass for taking goods on defendants restoring them or the value of costs, where it will not end the suit, and value not admitted. *Knott v. Barker*, 3 Anst. 896.

[An ejectment by mortgagee.] Where a mortgagee gives an ejectment to get possession, and mortgagee refuses to stay proceedings on payment of what is due of costs, if the mortgagee gives notice of other demands as cause against the order, he must specify nature and amount. *Goodtitle d. Leon v. Lonsdale*, 3 Anst. 937.

An order will be granted, although applied for on the last day of term, to set aside and stay the proceedings on a bail-bond assigned, if the motion could have been made before. *M'Phedron v. Fitherton*, 2 Pri. 143.

The court will not generally grant a rule to shew cause on the last day of term, where it would operate to stay proceedings. (But see the next case.)

The court will grant an injunction to stay proceedings at law, before answer, even where the defendant having obtained time for the return of commission abroad to take the answer, is not in contempt for putting it in, if it is shewn that in consequence of necessary intermediate delay, the action at law could be tried before the expiration of the time allowed for its return. *Farnell v. Nesbit*, 2 Pri. 144.

SUBSCRIBING WITNESS.

Subscribing witness ordered to make affidavit of the execution of an instrument attested by her, or show cause to the court why she should not. *Watson v. Faulkner*, 1 Pri. 308.

SUBPCENA AD RESPONDENDUM.

Process of subpoena ad respondendum may be issued out of the office of pleas; and it is not necessary that such process should be signed by the chief secondary, or a sworn clerk in the office of the king's remembrancer. The rules made in that respect in the reigns of James and Charles 2, are obsolete and of no force. *Taylor v. Riley*, 9 Pri. 385.

[Service.] If a copy of subpoena be left with a servant of defendant's brother, (who was also his partner and co-defendant in the suit, and personally served,) at whose house such servant acknowledged [6th November] that defendant resided, will be good service, although the party be out of the kingdom at the time. And a rule (for setting aside an attachment) obtained on a representation that the party was abroad at the time of service, will be discharged on such cause shown, with costs. *Bridwood, assignee, v. Hart and another*, 3 Pri. 176.

A subpoena requiring the defendant in an information to appear immediately may be tested out of term time.

Qu. Whether a party usually and permanently residing at Bristol, being in town on business, and living during his stay there at a coffee-house in Westminster, is liable to an attachment for not appearing to a subpoena (returnable immediately) within the time limited for appearance to such process, viz. one clear day from the time of the service, as being a person who, at the time of the service, was residing within five miles of the court? Rule discharged without costs. *Att. Gen. v. Jenkins*, 12 Pri. 69.

In order to attachment the subpoena itself must be served where there is only one defendant, a copy will not suffice. *De Tillon v. Sidney*, 1 Anst. 79.

SUGGESTING BREACHES.

On stat. 8 & 9 W. 3. after verdict. See *Gillingham v. Waskett Myers*, 13 Pri. 791.

TAXES, ASSESSED.

Venditioni exponas awarded to sell issues distrained under 43 G. 3. c. 99. s. 47. on a motion. *In re Assessed Taxes*, 12 Pri. 172.

If there be two collectors of taxes appointed under the 43 G. 3. c. 99. s. 13. for a single parish, by the commissioners, one for one division of the parish called the upper parish, and one for another called the lower parish, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions—in case of a deficiency in the amount of the taxes collected, through the misconduct of either, the whole parish must be re-assessed, and not the particular district the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises, although the taxes of other division have been collected and paid over to the receiver-general, the appointment being held by the court to be considered as one appointment, of two for the parish, which would be valid under the act, and not of one for each subdivision, which would be invalid, the converse of *Barrs v. Degly and others*, 1 New R. 281. *Ex parte Inhab. of Heullan*, 7 Pri. 594.

The court will not on motion enter into any question of rateability to the assessed taxes. *Rex v. Navy Commissioners, &c.* 3 Anst. 858.

On the collectors of assessed taxes not paying over

the parish is answerable to the crown for the amount. *Res v. Inhab. of St. George's Hanover Square*, 3 Anst. 299.

It does not seem to be necessary under 43 G. 3. c. 99. that the commissioners should issue their warrant against the collector to recover the taxes detained in order to authorise the issuing an extent against him as a condition precedent; or if it is, it is rather a ground of a motion to set aside the extent for irregularity. *Res v. Collingridge*, 3 Pri. 280.

A collector of taxes in custody under an extent is not entitled to be discharged, although his deficiency has been made good to the crown by a re-assessment upon the parish. *Res v. Bennett*, Wightw. 1.

Mode of enforcing re-assessment of amount of deficiency in the collection of the assessed taxes by distringas against the collectors, on motion by the attorney general on the part of the commissioners for affairs of taxes. *In re Assessed Taxes*, 12 Pri. 153.

TERM'S NOTICE.

See JUDGMENT AS IN CASE OF NONSUIT.

TITHES.

After payment of money into court by a defendant, in an action brought against him on 2 & 3 Edw. 6. c. 6. by a farmer of tithes, he cannot object to the plaintiff's title to the tithes, because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages. *Broadhurst, clerk, v. Baldwin*, 4 Pri. 58.

TRESPASS.

Certificate to deprive plaintiff of costs.] To a declaration of trespass *quare domum fragit*, with a count *de bonis assortatis*, the defendant pleaded the general issue and accord and satisfaction, (the question at the trial being whether a term for years had expired) and the jury found a general verdict for the plaintiff on both counts with damages under 40s. and the jury certified the amount of damages under 43 Eliz. c. 6. s. 2. Held that the plaintiff was entitled to costs *de incremento*, notwithstanding the certificate. See 22 & 23 Car. 2. c. 9. s. 136. *Wright v. Piggin*, 2 Y. & J. 544.

TRIAL.

Notice of.] The clause in 14 G. 2. c. 17. s. 4. requiring ten days' notice of trial for the sittings in London or Westminster to be given to a defendant, when he resides above forty miles from the said cities, was held to apply to his permanent, not temporary residence. *Rain v. Hodgson*, 2 Pri. 279.

Notice of trial of information given from time to time after the sittings after Easter Term 1818, till the sittings after Michaelmas, when it was given for the sittings after the next Hilary Term (the trial having been postponed for defect of special jurymen) and the cause was not tried on the last occasion, on account of the absence of a material witness for the Crown, who being expected till the last moment, the notice was not then countermanded. Held a sufficient proceeding effectually to prevent the recognizance of bail being vacated, as it may be where the attorney general has not taken any effectual proceeding for three successive terms. *Att. Gen. v. Finch*, 7 Pri. 557.

Where the defendants in a joint information employ two different attorneys and clerks in court, if notice of trial be served on one of them only, and a verdict be obtained, the court will set it aside and award a new trial as to both, notwithstanding the offence charged by one would affect them both as partners in trade: the costs of the trial already had, to abide the event of the second verdict. *Att. Gen. v. Stevens and another*, 3 Pri. 72.

Postponing.] If the trial of an information has been once postponed at the instance of the attorney general *pro defectu juratorum*, the court will also grant the defendant a rule to show cause why the trial should not be further postponed, on his application, if in the meantime a material witness, depend to have been ready in the former occasion, is not forthcoming. *Att. Gen. v. Hughes*, 3 Pri. 35.

Trial of information postponed, on application by rule enlarged to the last day of term, on the ground of absence of a material witness, on payment by defendant of such costs incurred by the crown in preparing for the trial of this cause at the next ensuing sittings, as would not serve again, and of the crown appearing upon this application. *Attorney General v. Phillips*, 13 Pri. 592.

The affidavits to ground an application to postpone the trial of an information, on account of the absence of a material witness, must shew where the witness is. *S. C. M'Cle. 251.*

Trial of a revenue information further postponed on the motion of the defendant, although he had not complied with the terms of a former postponement, by paying the costs of the day.

Such applications are not *ex gratia*, where founded on the absence of a material witness. *Attorney General v. Gatliffe*, 12 Pri. 367.

Putting off.] A defendant in an information may apply by motion to the court in term time, for notice of trial given, to postpone trial, on the ground of the absence of a material witness, upon a proper affidavit, containing the necessary statements.

An application for a rule to shew cause on the last day of term was granted on the day before, on a notice of trial served on the 31st of January, and the rule was made absolute without costs: nor would we make it part of the order that the defendant should pay the costs of such proceedings as would not serve again. *Attorney General v. Moss*, 13 Pri. 258.

The Court will not postpone the trial of an information on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think there has been sufficient time for its return.

It should be stated in the affidavit in support of such an application, that the return is expected, and when. *Attorney General v. Laregoity*, 3 Pri. 221.

If there has been any delay between the first process issuing against a defendant and the filing of the information against him, and during that interval as well as some of his witnesses have gone absent on duty, the Court will postpone the trial on motion. *Attorney General v. Thacker*, 2 Pri. 116.

Costs for not proceeding to trial.] See JUDGMENT AS IN CASE OF NONSUIT.

The application for costs for not proceeding to trial, and for deducting the amount when taxed for the damages ultimately recovered by plaintiff, cannot be made by one motion. The latter part of such an application will be allowed in this Court. *Lang v. Webster*, 1 Pri. 375.

Loosing.] See LOSING A TRIAL.

Of causes affecting Revenue Officers.] This Court will remove an action brought in another court against an officer of excise, for refusing to accept the duty of goods warehoused, and to grant the usual certificate whereby, &c. (suggesting loss,) where part of the goods having been afterwards seized, an information for their condemnation is depending in the Court of Exchequer. And they will order the trial of the action removed, to wait the result of the trial of the information. *Bensington v. Stratford*, 8 Pri. 364 and see tit. PREROGATIVE.

A defendant who has been arrested on a revenue information filed against him, and has entered his recognizance of bail to appear and answer, cannot

to discharge such recognizance on the ground of attorney General not having proceeded to trial till notice till after three clear terms (exclusively) have elapsed not after issue joined, but the time for which notice of trial had been given. A defendant arrested in Michaelmas term, having bail in December, and pleaded in Hilary and received notice of trial for the subsequent term, cannot move until after Michaelmas term. *Jen. v. Bear*, 6 Pri. 89.

TROVER.

rule granted, to shew cause why, on the defendant delivering up to the plaintiff a horse, for which he sought trover, and paying his costs, all further proceedings should not be stayed, on an affidavit that animal was not in a worse state than when he entered into the possession of the defendant, but in an improved condition,—discharged, on cause shewn, costs. *Markinson v. Rawlinson*, 9 Pri. 460.

USE AND OCCUPATION.

See AFFIDAVIT TO HOLD TO BAIL.

VARIANCE.

See IRREGULARITY.

VENIRE DE NOVO.

The Court has no discretionary power over the costs of application for a *venire de novo*. *Edwards v. ... and others*, 1 Tyr. 281.

Where a *venire de novo* is awarded, the Court will grant the costs of the application. *Edwards v. ... and others*, 1 C. & J. 364.

VENUE.

[*hanging*.] The Court will not change the venue in any case where a trial has been had. *Butts v. Bilk*, 1 L. 146.

The defendant move in this Court to change the venue to a county palatine, the Court will require that he shall undertake not to assign the want of an original error: and instead of giving the ordinary rule they will make it a rule to shew cause. *Johnson*, 13 Pri. 52.

The venue will not be changed in an action of contract on a policy of insurance. *Smith v. Stansfield*, 1 L. & Y. 212.

The venue may be changed in an action on a written agreement not under seal, where plaintiff does not undertake to give material evidence in the first county. *Wright*, 1 Tyr. 632.

Similarly, the rule for changing the venue should be taken up on reading the declaration, as well as the affidavit. *Mercer v. Waters*, 1 Tyr. 533. n.

The Court will not change the venue from the city of Gloucester to the city of Bristol, in Hilary term, on the usual affidavit, although the defendant is on merits, and offer to pay into Court the debt, or a sum of money to cover costs; and such a rule discharged with costs. *Broadrick v. Clark and ...*, 11 Pri. 742.

The Court will not change the venue in an action of debt, unless on special grounds. *Cumming, clerk, ... Taylor*, 2 Y. & J. 110.

The rule to change the venue in this Court a rule which makes itself absolute, unless cause be shown on or before the day mentioned in the rule; affidavits sworn after that day cannot be used to shew cause. *Bagnall v. Shipham*, 1 C. & J. 377.

The venue can be brought back to the original place where it was laid, only on undertaking to give material evidence in that county. S. C.

This Court will not admit as sufficient cause against

a rule to change the venue, that the declaration contains a count on a promissory note, unless the plaintiff undertake to give evidence on such count. *Escherville v. Cooper*, 1 Pri. 374.

The defendant cannot, in this Court, change the venue, after having obtained an order for time to plead, "on the usual terms" generally. It is considered to be one among what are commonly expressed in the order to be the usual terms imposed by it on giving time, that the defendant shall not afterwards move to change the venue. When the order is intended to be without prejudice to a change of venue, it should be so expressed in the summons for attending the judge. Nor will the Court order a change of venue in such a case, although the defendant proposes to give judgment of the term. *Waring v. Holt*, 3 Pri. 3.

A defendant, in an information at the suit of the attorney-general, is not entitled to a change of venue without his consent. *The Att. Gen. v. Smith*, 2 Pri. 113.

[*Bringing back and retaining venue*.] The Court will discharge a rule obtained by a defendant to change the venue, in an action against him by the assignees of a bankrupt, on the usual affidavit that the cause of action arose in another county, and that his witnesses reside there; the plaintiff swearing that the cause of action arose in a third county, and that his witnesses reside at a very considerable distance from the county to which the venue is sought to be removed, and undertaking to give evidence in the original, or the third county; although the defendant has agreed to admit every fact establishing the bankruptcy, except the petitioning creditor's debt. The costs to abide the event. *Bowden and others, assignees, v. Glasson*, 5 Pri. 359.

Where a venue laid in *Middlesex* had been changed to *Stafford*, on the usual affidavit, the Court refused to bring it back, on an affidavit stating that the goods (which had been purchased and paid for by plaintiff, as agent for defendant, and for which the action had been brought,) were partly paid for in *London* and partly in *Surrey*, and were sent to *Paddington*, in the county of *Middlesex*, to be forwarded thence to defendant; the plaintiff undertaking to give material evidence in *London* or *Middlesex*; he must undertake to give material evidence in the county in which he originally laid it. *Emery v. Emery*, 6 Pri. 386.

By the practice of this Court, undertaking to plead "on all the usual terms," implies, as one of those terms, the retaining the venue. Where a defendant, after having obtained three orders for time to plead on the above terms, moved to change the venue from *Middlesex* to *Lancaster*, whereby the trial would have been postponed from the sittings in Hilary term till the assizes, the Court refused the rule with costs. *Brettargh and others v. Dearden*, M'C. & Y. 106.

Rule to bring back the venue will be granted, though after the rule for changing it has become absolute, but without discharging the former rule. *Woolley v. Boutes*, 1 Tyr. 285. See *Roberts v. Wright*, 1 Tyr. 532.

Where a rule nisi had been obtained, for changing the venue from *London* to *Yorkshire*, in Easter Term, as of course, on the common affidavit, (not stating that defendant's witnesses resided there,) the Court of Exchequer would not retain it, on cause shewn that the plaintiff would be materially delayed without any other advantage to the defendant, by analogy with the rule that the venue cannot be changed into the Northern counties, previous to a Spring assize. *Bottomley v. Ikin*, 5 Pri. 612.

VERDICT.

[*Entering*.] The Court will not order a verdict to

be entered for the defendant on any given counts after disposal of a motion for a new trial. *Symonds v. Hearson and Fisher*, 12 Pri. 369.

Entering on particular counts.] Where a verdict had been entered up at nisi prius on a certain count, (in a declaration in case for libel, containing seventeen counts, to which the general issue was pleaded, with seventeen special pleas of justification,) wherein the libel professed to be set out, was set out with a material variance, the Court permitted the verdict to be entered up on other counts, which were not justified, and in which the libel was correctly set out. *Cooks v. Smith*, 13 Pri. 499.

VIEW.

In an information for duties against the proprietors of a glass manufactory, the Court will not grant a view of the premises where the question may be tried by the production of a model. *Att. Gen. v. Green*, 1 Pri. 180.

WARRANT OF ATTORNEY.

A warrant of attorney to confess judgment, with a defaultance upon payment by instalments, discharges the sheriff. *Brown v. Neave*, Wightw. 121.

Death of the parties.] A warrant of attorney is a personal authority and dies with the person, and his executors cannot put it in force. *Short v. Coglin*, 1 Anst. 225.

Judgment cannot be entered up in Exchequer on a warrant of attorney to confess judgment in a Court of Great Sessions. *Williams v. Williams*, 1 Tyr. 351.

WARRANT OF COMMITMENT.

See **BANKRUPT.**

WITHDRAWING PLEA.

The defendant was allowed to withdraw his plea, and to re-plead after giving notice that he intended to dispute the petitioning creditor's debt, &c. *Radmors and others, assignees, v. Gould*, Wightw. 80.

WITNESSES.

Examining abroad.] The plaintiff, in a bill for discovery, in aid of an action against him at law, may have, on motion at the sittings after term, a commission to examine his witnesses abroad, where the cause in the Court of law is at issue, and was entered for trial the term before that immediately preceding the sittings, where a case of defence has been stated by the bill, although the affidavit on which it is moved is in the common form; and the delay in staying of the trial is not a sufficient ground of opposition to such an

application. But the Court in granting it, will order it only on the terms, that the applicant pay into cost a very considerable part at least of the demand of the plaintiff at law to abide the event. *Ebdon v. Prime*, 8 Pri. 290.

Witness ordered out of court.] It is an inflexible rule, that a witness who is present in Court during a trial, when he ought to have been out of Court, and an order made for that purpose, cannot be examined, and the Court refused to grant rule to show cause why there should not be a new trial, where a person (not originally intended to be examined) who was present in Court, and who had been in Court during the trial, was called to give evidence, and was not allowed to be examined on that ground. *Att. Gen. v. Bulpitt*, 9 Pri. 4.

Examining witnesses abroad.] Since 1 W. 4. c. 22. c. 4. a commission may issue to examine witnesses at any place out of the jurisdiction of the Courts of law, on motion in that Court of law in which the action shall be pending; *Docket v. Williams*, 1 Tyr. 502. See *Reynard v. Cope*, id. 505. n. S. P.

What expenses allowed.] If a plaintiff subpoena witnesses at a certain time ready for trial, but which does not afterwards, in fact, come on, to be tried, in consequence of his declining to reply and take issue on a new fact, subsequently put on the record by additional plea; the expenses of the actual attendance of those witnesses are allowable on taxation of his costs, (the plaintiff ultimately succeeding on the trial of the cause), although he does not countermand his notice of trial in time, notwithstanding there might have been time enough for him to have done so during the intermediate period, and even to have replied and taken issue on the additional plea, on the ground that the plaintiff shall, in such case, be considered entitled to a reasonable time to give advice, and otherwise to prepare himself; but it should seem, that in such cases there must appear to have been some monetary delay, or other suspicious conduct on the part of defendant. *Allison v. Noverre and others*, 1 Pri. 301.

WRIT.

Tests.] The teste of a writ, if irregular in naming a late Chief Baron, instead of the existing one, may be amended. A rule for setting it aside was discharged. *Wakeling v. Watson*, 1 Tyr. 377.

Returning.] See **SUBPOENA.**
Service of.] See **SUBPOENA.**
Writs are returnable in Exchequer, on a general return by the day of the month. *Smith and others v. Parker and another*, McClell. & Y. 493.

APPENDIX, N^o. IV.

STATUTES

57 GEO. III. c. 117.—EXTENTS IN AID.

3 GEO. IV. c. 46. } ESTREATING FINES AND FORFEITED RECOG-
4 GEO. IV. c. 37. } NIZANCES.

7 & 8 GEO. IV. c. 71. s. 5.—DISTRINGAS.

EXTENTS IN AID.

57 Geo. 3. c. 117.

Act to regulate the Issuing of Extents in Aid.
[11th July 1817.]

WHEREAS extents in aid have in many cases been used for the levying and recovering of larger sums of money than were due to his Majesty by debtors on whose behalf such extents were issued, and it is expedient to prevent such practice; and in other cases extents in aid have been issued at the instance and for the benefit of persons indebted to his Majesty by simple contract: Be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, that upon the issuing of any extent in aid, on behalf of any debtor to his Majesty, after the passing of this act, his Majesty's Court of Exchequer at Westminster, or the chancellor of his Majesty's exchequer, or lord chief baron of the said court, granting the fiat for the issuing of such extent in aid, shall cause the amount of the debt or sum of money due, or claimed due to his Majesty to be stated and specified in the said fiat; and that in all cases in which the debt or debts found due to the debtor to his Majesty, shall be equal to or exceed the debt stated in the said fiat as aforesaid, the amount of the debt so stated and specified in the said fiat shall be indorsed upon the writ, and the writ so indorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute the said writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ; and that in all cases in which the debt or debts found due to the debtor to his Majesty shall be of less amount than the amount stated and specified in the said fiat as afore-

said, the amount of such debt or debts found due to such debtor to his Majesty shall be indorsed upon the writ, and the writ so indorsed shall be deemed to be and be the authority and direction to the sheriff or other officer who shall execute the said writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ; and that the money, levied, taken, recovered, or received under or by virtue of every such extent in aid so prosecuted and issued, shall be, by order of the said court, paid over to and for his Majesty's use, towards satisfaction of the debt so due to his Majesty as aforesaid.

II. Provided always, and be it further enacted, that in every case in which the sum produced by the sale of any lands, goods or chattels taken, or by the receipt of any sum of money by any sheriff or other officer under any such writ of extent, for the purpose of levying the amount or sum of money indorsed upon the back of the writ, shall be more than sufficient to satisfy the amount of the sum so indorsed upon the writ, such overplus shall be paid into the court of exchequer, together with the said amount indorsed upon the said writ; and the said court shall, upon any summary application or applications, make such order for the return, disposal or distribution of any such surplus, or any part or proportion thereof, as to the said court shall appear to be proper.

III. Provided always, and be it further enacted, that nothing in this act contained, and no seizure of any debt into the hands of his Majesty, or part recovery or payment of such debt, or other proceeding had under or in pursuance of this act, or in relation to the applying for, obtaining or executing any such writ, or disposing of any such overplus, shall affect or in any manner prejudice, either at law or in equity, any right, claim or demand of the person or persons to whom such debt shall have been due or owing, when seized into his Majesty's hands, or his or their assignee or assignees, or executor or

executors, or administrator or administrators, as to the remaining part of such debt, or as to the suing any person or persons against whom any such writ shall have been issued, or whose lands or goods shall have been seized or taken under any such writ, for the residue or remaining part of such debt, or as to the recovery of or receiving any residue or remaining part of any debt so seized or in part levied, recovered or paid, or any further or other debt seized or sued for under or by virtue of any such extent, but still remaining due and unpaid, either in the whole or in part; but that it shall be lawful for any person or persons as aforesaid, his or their assignee or assignees, executor or executors, or administrator or administrators, to demand, sue for, and recover the remainder of any such debt so seized, or any other debt or debts, by the like process and in the same manner as if no such extent in aid had issued; any thing contained in any act or acts of parliament, or law or laws, to the contrary notwithstanding.

IV. And be it further enacted, that from and after the passing of this act it shall not be lawful for any person or persons, companies or societies of persons, corporate or not corporate, who shall or may be indebted to his Majesty by simple contract only; nor for any such person or persons, companies or societies, who shall or may be indebted to his Majesty by bond for answering, accounting for, and paying any particular duty or duties, or sum or sums of money, which shall arise or become due and payable to his Majesty from such person or persons, companies or societies respectively, for and in respect and in the course of his or their particular trades, manufactories, professions, businesses or callings; nor for any sub-distributor of stamps who shall have given bond to his majesty; nor for any person who shall have given bond to his majesty, either jointly or separately, as a surety only for some other debtor to his majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, in consequence of the non-performance of the conditions of the bond by the principal, and then only to the amount of the said demand; to sue out and prosecute any extent or extents in aid, by reason or on account of any such debt or debts to his majesty respectively, for the recovery of any debt or debts due to such person or persons, companies or societies, or to such sub-distributor of stamps or surety as aforesaid; and that all and every commission and commissions to find debts, extent and extents in aid, and other proceedings which shall be so issued or instituted at the instance of or for such simple contract or bond debtor, or debtors respectively, and all proceedings thereupon, shall be null and void: provided always, that nothing herein contained shall extend or be construed to extend to preclude or prevent any persons who shall or may become debtor or debtors to his majesty by simple contract only, by the collection or receipt of any money arising from his majesty's revenue for his majesty's use, from applying for and suing out any commission or commissions, extent or extents in aid, in case one or more of such persons shall be bound to his majesty by bond or specialty of record in the said court of exchequer, for answering, securing, paying over or accounting for to his majesty, the particular duties or sums of money which shall constitute the debt that may be so then due from such person or persons to his majesty; any thing hereinbefore contained to the contrary notwithstanding.

V. Provided nevertheless, and be it further enacted, that no extent in aid shall be issued on any bond given by any person or persons as a surety or

sureties for the paying or accounting for any debt which may become due to his majesty from any body or society, whether incorporated or otherwise, carrying on the business of insurance against any risks either of fire or of any other kind whatsoever.

VI. And be it further enacted, that it shall not be lawful for any person or persons who are now, or who shall hereafter be imprisoned under or by virtue of any writ of capias in any extent or extents in aid, to apply to the barons of his majesty's court of exchequer in England or Scotland, or to any baron of the same court in vacation, for his, her or their discharge, giving one month's previous notice in writing to the person or persons to whom he, she, or they owed the debt or sum or sums of money for which he, she or they is or are so imprisoned, at the time such debt was seized under such extent in aid, of his, her or their intention to make such application, and stating in such writ the ground of such application, and an enumeration and description of all and every the property, debts and effects whatsoever of such person or persons as his, her or their own possession or power, or in his possession or power of any other person or persons for his, her or their use; and for the said court, or any such baron in vacation to whom such application shall be made, to order such person or persons to be brought before them or him to be examined upon oath touching and concerning his, her or their property and effects; and if such person or persons respectively, shall upon such examination make a full disclosure of all his, her or their property and effects, to the satisfaction of the said court or baron, or it shall otherwise appear reasonable and proper to such court or baron that such person or persons should be no longer imprisoned under such writ for such court or baron to order a writ of *habeas corpus* to be issued out of the said court for the liberation of such person or persons from such imprisonment: provided always, that such liberation as aforesaid shall be held or deemed to satisfy or supersede such extent in aid or proceedings thereon, except as to such imprisonment as aforesaid, or the debt or debts seized under and by virtue thereof, and for which such person or persons shall be so imprisoned.

ESTREATING FINES, AND FORFEITING RECOGNIZANCES.

3 Geo. 4. cap. 46.

An Act for the more speedy Return and Levying of Fines, Penalties and Forfeitures, and Recognizances estreated.

[24th June 1806.]

Whereas an act was passed in the twentieth and twenty-third years of his late majesty King Charles the second, intituled an act for the better and more certain recovery of fines and forfeitures due to his majesty, which act was made perpetually by an act passed in the fourth and fifth years of the reign of their late majesties William and Mary intituled an act for reviving, continuing and explaining several laws therein mentioned, which act expired and near expiring: and whereas it was passed in the forty-first year of his late majesty George the third, intituled an act for the better payment of fines and forfeitures imposed by statutes out of sessions in England: and whereas great delays occur in the return of fines, recognizances, forfeited recognizances, and sums of money paid or to be paid in lieu or satisfaction of them or any of them, by or before justices of the peace, or at any general or sessions of the peace in that part of the

dom called England: and whereas such delays in the due administration of justice as well as recovery of the fines and forfeitures due to the crown thereupon, and it is therefore expedient that no provision should be made for the speedy regular return of all such fines, issues, amerciaments, forfeited recognizances, and sum or sums of money paid or to be paid in lieu or satisfaction of any or any of them: may it therefore please your Majesty that it may be enacted; and be it enacted by King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this parliament assembled, by the authority of the same, That from and after the twenty-ninth day of September, one thousand eight hundred and twenty-two, so much of the aforesaid act passed in the twenty-second and twenty-third years of the reign of his late Majesty King Charles the second, as relates to fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them imposed and adjudged at any quarter sessions of the peace; and that such part of the aforesaid act of their late Majesties William and Mary, as makes perpetual the aforesaid provisions contained in the said act passed in the twenty-second and twenty-third years of the reign of his late Majesty King Charles the second, and likewise so much of the said act passed in the forty-first year of the reign of his late Majesty King George the third, as relates to the usual payment of all fines, forfeitures and penalties, or such parts thereof as shall be due to the crown, imposed and received by any justice out of sessions, and not made payable to any body or bodies corporate, or any commissioners of any public ward, or any other person or persons, into the hands of the sheriff, previous to the Michaelmas sessions; and also so much of the said act of the twenty-first year of the reign of his said late Majesty King George the third, as requires such justices, previous to the Michaelmas sessions yearly, to transmit to the clerk of the peace or town clerk such fine was imposed, an account in writing of all such fines, shall be and are hereby repealed.

And be it further enacted, That from and after the twenty-ninth day of September, one thousand eight hundred and twenty-two, all fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them (save and except the same only, by virtue of any act or acts of parliament made or to be made, be otherwise directed to be levied, recovered, appropriated, or disposed of), which already are or hereafter shall be set, imposed, lost or forfeited by or before any justice or justices of the peace in that part of the united Kingdom called England, shall be and are hereby required to be certified by the justice or justices of the peace by or before whom any such fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, shall be set, imposed, lost, forfeited, to the clerk of the peace of the county, town clerk of the city, borough, or place, in writing, containing the names and residences, trade, profession or calling of the parties, the amount of the sum forfeited by each respectively, and the use of each forfeiture signed by such justice or justices of the peace, on or before the ensuing general or quarter sessions of such county, city, borough or place respectively; and such clerk of the peace or town clerk shall copy on a roll such fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, together with all

sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them imposed or forfeited at such court of general or quarter sessions, and shall, within such time as shall be fixed and determined by such court, not exceeding twenty-one days after the adjournment of such court, send a copy of such roll, with a writ of distringas and capias or fieri facias and capias according to the form and effect in the schedule marked (A.) annexed to this act, to the sheriff of such county, or the sheriff, bailiff or officer as such city, borough or place having execution of process therein respectively, as the case may be, which shall be the authority to such sheriff of such county, or the sheriff, bailiff or officer, as the case may be, for proceeding to the immediate levying and recovering of such fines, issues, amerciaments, forfeited recognizances, sum or sums of money to be paid in lieu or satisfaction of them or any of them on the goods and chattels of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found whereon distress can be made for recovery thereof; and every person so taken shall be lodged in the common goal until the next general or quarter sessions of the peace, there to abide the judgment of the said court.

III. And be it further enacted, That the clerk of the peace or town clerk shall, before he shall deliver the roll to such sheriff, bailiff or officer, containing the fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, and is hereby required to make oath before any justice of the peace or the county, riding, city, borough or place for which such clerk of the peace or town clerk shall act: which oath shall be indorsed on the back of the writ, or of the said roll attached thereto, such clerk of the peace or town clerk stating therein all such fines, issues, amerciaments, forfeited recognizances, sum or sums of money, which shall have been paid or otherwise accounted for; and such oath shall be made in the form following:

"I—make oath, That this roll is truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances, and forfeitures, which were set, lost, imposed or forfeited, and in right and due course of law ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll, and that in the said roll are also contained and expressed, all such fines as have been paid to, or received by me, either in court or otherwise, without any wilful or fraudulent omission, misnomer, or defect whatever. So help me GOD."

IV. And be it further enacted, That each and every justice of the peace before whom any recognizance shall be entered into or taken, shall and is hereby required to give, or cause to be given, at the time of entering into such recognizance, to the person or persons, surety or sureties so entering into the same, and to each of them, a written or printed paper or notice, in the form or to the effect stated in the schedule marked (B.) to this act annexed, adapting the same to the particular circumstances of the case; and each and every such justice shall in such recognizance state and particularly specify not only the profession, art, mystery, or trade, of every person so entering into such recognizance, together with their christian name and names and surnames, but also the parish, township or place of his or her residence; and in case such residence shall be in any city, town or borough, shall also state and particularly specify the name of the street and number of the house (if any) in which such person shall reside, and also

VI. Provided always be it enacted, That if any person on whose goods and chattels such sheriff, bailiff or officer shall be authorized to levy any such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, shall give security to the said sheriff, bailiff or officer for his appearance at the next general or quarter sessions, then and there to abide the decision of the court, and also to pay such forfeited recognizance or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as shall be ordered and adjudged by the court, it shall be lawful for such sheriff, bailiff or officer, and he is hereby authorized and required, to discharge such person so giving such security out of custody: provided also, that in case such party so giving security shall not appear in pursuance of his undertaking, it shall be lawful for the court forthwith to issue a writ of distresses and capias, or fieri facias and copias, against the surety or sureties of the person so bound as aforesaid.

VI. And be it further enacted, that the court of general or quarter sessions before whom any person so committed to gaol or bound, to appear shall be brought, is hereby authorized and required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, or any part thereof; and such order shall be made in the form or to the effect of the schedule marked (C.), to this act annexed, and shall be signed by the clerk of the peace, which said order shall be a discharge to such sheriff, bailiff, or officer, on the passing of his accounts at the exchequer, or before any auditor or other proper officer duly authorized to pass the same; and in all cases where the party shall have been lodged in the common gaol by such sheriff, bailiff, or other officer, the justices of the peace so assembled are hereby empowered either to remand such party to the custody of the sheriff, bailiff, or other officer, or upon the release of such party from the whole of such forfeited recognizance, to order such party to be discharged from custody, and such order shall be full and sufficient discharge to the said sheriff, bailiff, or officer on the passing of his accounts at the exchequer, or before any auditor or other proper officer duly authorized to pass the same; and it shall and may be lawful to and for the said court of general or quarter sessions to award such costs, charges, and expences, to be paid by either party to the other, as to the said court shall seem just and reasonable.

VII. And be it further enacted, that in all cases where the party incurring any fine, issue, amercement, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, shall reside in another county, or in any city, borough, or place having peculiar jurisdiction, or shall have fled into any other county, or into any such city, borough or place, after such fine, issue, amercement, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, shall have been imposed, it shall be lawful for the said sheriff, bailiff or officer, and he is hereby required to apply to any justice of the peace acting for such county, city, borough or place into which the party may have fled or removed his goods and chattels, and such justice is hereby required, upon proof on oath of the hand-

writing of the sheriff or under-sheriff, bailiff, or officer granting such warrant, to indorse his name thereon; which shall be a sufficient authority to the person bringing such warrant, and to all other persons to whom the same may be directed, to search the same in such other county, city, borough or place; and in case such sufficient distress shall be found whereon to levy such fine, issue, amercement, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, and all costs and charges attending the recovery thereof, then to take the body of the party and lodge him in the gaol of the county, city, borough or place in which the forfeiture has been incurred; then to await the decision of the court at the ensuing general or quarter sessions.

VIII. And be it further enacted, that the sheriff, bailiff, or officer shall, on the opening of the court on the first day of the ensuing general or quarter sessions, return the said writ, and all state on the back of the said writ what shall be done in the execution of such process; which return, together with a duplicate of the roll of fines, issues, amercements, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, at the preceding quarter sessions; and the verdicts of the court on the back of the roll, stating that due diligence has been exercised on the part of the sheriff, shall be transmitted by the clerk of the peace to the lords commissioners of his majesty's treasury of the united kingdom of Great Britain and Ireland.

IX. Provided always, and be it further enacted, that none of the proceedings under this act shall be liable to or charged with any stamp duty.

X. And be it further enacted, that the clerk of the peace and other officers shall be entitled to their usual and legal fees on the discharge of any forfeited recognizance, and the said clerk of the peace to an allowance of six-pence for every hundred words, for all copies of the roll sent to the said lords commissioners of the treasury; and in case any such sheriff, bailiff, or other clerk of the peace shall refuse or neglect to do and perform any duty, not so thing imposed or required upon or from such sheriff or clerk, bailiff or officer, in answer by this act directed, then and in every such case such sheriff, bailiff or officer, or clerk so refusing or neglecting, shall forfeit and pay the sum of five pounds, to be recovered by any person or persons who will sue for the same, together with full costs of suit, by action of debt or on the case, in any of his majesty's courts of record at Westminster: wherein no counsel, protection, wages of law or any more than one appearance shall be allowed.

XI. Provided always, and be it enacted, that nothing in this act contained shall extend to be construed to extend so as to prevent or interfere with the appropriation of any such fines, issues, amercements, forfeited recognizances, sum or sums of money, when so paid or accounted into the said court of exchequer by any sheriff, bailiff or officer, but the same shall as may be applied, disposed of, and appropriated in such and the like manner as such fines, issues, amercements, forfeited recognizances, sum or sums of money paid in lieu or satisfaction of them or any of them, paid into the exchequer, were applied, disposed of, and appropriated before the passing of this act.

XII. Provided also, and be it enacted, that it shall be lawful for the lords commissioners of his majesty's treasury to make such compensation as they may think fit, for the loss of any legal fees occasioned to the officers thereof, or to the officers

be court of, the shire of Lancaster, by this

III. Provided always, and he it further enacted, that nothing in this act contained shall extend in any way prejudicial to the rights, liberties, or privileges of the king's most excellent majesty his heirs and successors, in right of this by or county palatine of Lancaster; but that same rights and privileges shall be enjoyed used in all respects, and to all intents and purposes whatsoever, in the same manner and form they were before the passing of this act; any thing herein contained to the contrary notwithstanding.

IV. Provided always, and he it further enacted, that all and every the clerk and clerks of this shire, and all town clerks, within that part of the said kingdom called England, do each and severally the second Monday after the month of April yearly in every year, make and deliver into court of exchequer a true and perfect duplicate certificate of all such fines, amerciaments, forfeitures, recognizances, and other sums of money, and other forfeitures whatsoever paid in or satisfaction of, these or any of them, as shall be contained in the several rolls or copies which shall be so sent out to the sheriff for the purpose of being as aforesaid, and which shall have been lost, imposed, or forfeited in any of the sessions of the peace, which shall be held before the chancery in each year, so as the intent that the sheriffs, on their appearance in the said courts of exchequer, may be charged in their accounts with the moneys levied and received by him or them respectively upon such writs or otherwise, and that parties entitled to any such fines, recognizances, or other forfeitures, or any portion or portions thereof, may be at liberty to claim the same before foreign apposer, of the said court of exchequer, according to the ancient course and practice of the said court.

XV. Provided always, and be it further enacted, that nothing in this act contained shall in any sort tend or be construed to extend to the prejudicing rights, and privileges of any bodies politic or corporate, or their successors, or of any lord or lords of any manor, liberty or franchise, whatsoever; any thing herein to the contrary thereof in any wise notwithstanding.

XVI. Provided always, and be it enacted, that nothing in this act contained shall extend to either in any way prejudicial to the rights, liberties, privileges, liberties, charter or charters of the city of London; but that the said city may enjoy the same accordingly, as they formerly have enjoyed the same, in all respects and to all intents and purposes whatsoever, in the same and in as full and ample a manner as they before this act had enjoyed the same; any thing herein contained to the contrary thereof in any wise notwithstanding.

SCHEDULE (A.)

Whereas the Fourth, by the grace of God, of the united kingdoms of Great Britain and Ireland, king, defender of the faith;

the sheriff or bailiff or officer (as the case may be) for the county of — (or city, borough or place, as the case may be) greeting.

You are hereby required and commanded, as you guard yourself and all yours, that you omit not by reason of any liberty in your county, city, borough or place, as the case may be, but that you enter the same, and of all the goods and chattels, lands and tenements of all and singular the persons in the several extracts of this writ annexed, you cause to

be levied; all and singular the debts and sums of money upon them, in the same extracts severally imposed and charged; so that the moneys may be ready for payment at the next general or quarter sessions of the peace, to be paid over in such manner as any two or three of the justices or commissioners of his majesty's treasury may direct; and if any of the said several debts cannot be levied by reason of no goods or chattels being to be found belonging to the parties, then in all cases that you take the bodies of the parties refusing to pay the aforesaid debts, and lodge them in the goal (of the county, city, &c.) there to await the decision of the justices assembled at the next general or quarter sessions, unless the parties shall have given sufficient security for their appearance at such sessions, for which you will be held answerable, and have kept them then this writ. Witness — keeper of the rolls of the county, at — in the county of — the — day of — in the — year of our reign.

— Clerk of the peace, or

Sheriff, (B.)

Take notice, that you are to be bound to the writ of — pounds, and your services in the sum of — pounds, to appear at the quarter or general sessions of the peace for the county of — to be holden at — on the — day of — next, and unless you personally make your appearance accordingly, the recognizances entered into by yourself and securities will be forthwith levied on you and your bail. Dated this — day of — one thousand eight hundred and twenty —

— Justices of the peace.

Sentence (C.)

To the sheriff, [bailiff, or officer, as the case may be] of the county, city, borough or place, where the case may be, of —

Whereas — hath appeared before the justices assembled at the general or quarter sessions of the peace for the county of — on the — day of — has forfeited the sum of — [there describing the nature of the fine or forfeiture], and having made it appear to the satisfaction of the justices assembled, that he should be relieved from the payment of the said sum of — [if the penalty is mitigated, state from what part thereof], you are therefore hereby required to discharge the said sum of — from the estate roll delivered to you after the quarter sessions held at — for which discharge this warrant shall be your authority; and shall exonerate you from the said charge on the final passing of your accounts at the exchequer, or before any other officer duly authorised to pass such account.

By order of the Court, —

4 Geo. 4, cap. 37.

An Act to amend an Act for the more speedy return and levying of Fines, Penalties and Forfeitures; and Recognizances estreated.

[27th June 1823.]

Whereas an act passed in the third year of the reign of his present majesty, intituled 'An Act for the more speedy return and levying of fines, penalties and forfeitures, and recognizances estreated'; and whereas it is expedient that some of the provisions of the said act should be amended: may it therefore please your majesty that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of

the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for the justices assembled at any general or quarter sessions of the peace, and they are hereby authorized and required, at the following or any subsequent general or quarter sessions held after the return of the writ and roll issued from any preceding general or quarter sessions, at the opening of the court, to insert or cause to be inserted in any following roll, all such fines, issues, amerciaments, forfeited recognizances, sum or sums of money to be paid in lieu or satisfaction of them or any of them, which have not been duly levied, or recovered, or properly accounted for by the sheriff, bailiff, or other officer, or have not been discharged on appeal before the general or quarter sessions, or by sign manual, warrant or authority of any three or more of the commissioners of his majesty's treasury of the united kingdom of Great Britain and Ireland, and so to continue such process from sessions to sessions, till it shall be duly ascertained, to the satisfaction of the said commissioners of his majesty's treasury, that the party in default has not any goods or chattels, lands or tenements, in the county, division, riding, city, town, or place, on which a levy can be made, nor in any other county, division, riding, city, town or place in Great Britain, and that he is not to be found, or that his body cannot be lodged in any of his majesty's gaols: provided always, that the said sheriff, bailiff, or other officer to whom the writ of distringas and capias, or fieri facias, or other writ deemed necessary by the justices at any such general or quarter sessions to meet the exigency of the case, shall be sent by order of the said court, shall keep and detain in his possession the writ or writs so directed to him, and the roll or rolls attached to such writ or writs, delivering to the said court of general or quarter sessions a copy of such roll or rolls, on the first day of the sitting of the said court, and also a copy of any former roll or rolls, where the fines, issues, amerciaments, forfeited recognizances, (a) sum or sums of money paid or to be paid in lieu or satisfaction of them, or any of them, shall not have been delivered; and such original writ and roll, or writs and rolls, shall continue in force and effect, and shall be sufficient authority, without any further writ or roll; and such sheriff, bailiff, or other officer, is hereby authorized and required, on quitting his office, to deliver over to his successor all rolls and writs in his possession, particularizing any fines, issues, amerciaments, forfeited recognizances, sum or sums of money, paid or to be paid in lieu or satisfaction of them, or any of them, in order that the sheriff, bailiff, or other officer coming into office, may use every means in his power for recovering the sums so unpaid, and not charged to his predecessor on the passing of his accounts at the exchequer, or before any auditor or auditors, or other person duly authorized to pass the same, the officer or officers entrusted with the execution of the process in any county, division, riding, city, town or place, being first duly and diligently examined on oath by the court, at the delivery of the roll, on the first day of each general or quarter sessions, and in case such examination should not then take place, then on the subsequent day; and every such examination shall be duly recorded by the clerk of the peace or town clerk, or other proper officer, in order that such sheriff, bailiff, or other officer may be chargeable with all sums not satis-

(a) *Sic.*

factorily accounted for on the final passing of the accounts.

II. And whereas it is in and by the said recited act directed, that in all cases where the party incurring any fine, issue, amerciamment, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, shall reside in another county, or in any city, borough or place having peculiar jurisdiction, or shall have moved into any other county, or into any such city, borough or place, after such fine, issue, amerciamment, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them shall have been incurred, or shall have removed goods and chattels out of the jurisdiction in which such fine, issue, amerciamment, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them shall have been incurred, it shall be lawful for the said sheriff, bailiff, or officer, and he is hereby required, to apply to any justice of the peace, acting for such county, city, borough or place into which the party shall have fled, or removed his goods and chattels; and such justice is hereby required, upon proof to the satisfaction of the said justice, of the handwriting of the sheriff or under the seal of the bailiff or officer granting such warrant, to issue his name thereon, which shall be a sufficient authority to the person bringing such warrant, and to all other persons to whom the same may be directed, to execute the same in such other county, city, borough or place; and in case sufficient goods shall not be found, whereon to levy such fine, issue, amerciamment, estreated recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, and all costs and charges attending the recovery thereof, then to take the body of the party, and lodge him in the gaol of the county, city, borough or place in which the said fine, issue, amerciamment, or recognizance has been incurred, there to await the decision of the court at the ensuing general or quarter sessions; and whereas such provision has been found insufficient for the purposes thereby intended, and it is necessary that better provisions should be made to that purpose: be it therefore enacted, that so much of the said recited act shall be repealed, and it is hereby declared to be null and void to all intents and purposes whatever.

III. And be it further enacted, that in all cases where the party incurring or subject to any fine, issue, amerciamment, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, shall reside, or shall have fled or removed from or out of the jurisdiction, the sheriff, bailiff or other officer, in which such fine, issue, amerciamment, forfeited recognizance, sum or sums of money to be paid in lieu or satisfaction of them or any of them, shall have been incurred, imposed or forfeited, or become due, shall be lawful for such sheriff, bailiff or other officer, and he is hereby authorized and required to issue his warrant, together with a copy of the writ directed to the sheriff, bailiff or other officer for the county, riding, city, borough or place in which such person shall then reside or be, and in which any goods or chattels or other property shall be found, requiring such sheriff, bailiff or other officer to execute such writ, and every such warrant mentioned sheriff, bailiff or other officer, is hereby authorized and required to act in all respects in pursuance of such warrant, in the same manner as if the writ had been delivered to him by order of the court of the general or quarter sessions of the

(a) *Sic.*

city, borough or place for which such sheriff or other officer shall act; and the said sheriff, or other officer is hereby required, within days after the receipt of such warrant, to return the sheriff, bailiff or other officer, from whom I have received the same, what he shall have done in the execution of such process, and whether he shall have given good and sufficient security to appeal at the ensuing general or quarter sessions to be held for the county, riding, city, borough or place from which the writ issued, and in which levy shall have been made, to pay over all moneys received in pursuance of the warrant to the sheriff, bailiff or other officer from whom he shall have received the same.

And be it further enacted, that every sheriff, or other officer acting for any county, dividing, city, borough or place, shall and he is hereby required to make up or cause to be made up, at, and immediately after the expiration of the term for which he shall act, or after the usual term for making up his account, in case he shall have any grant, appointment or other authority longer period than one year, an account in writing, containing the names and residences of all persons incurring fines, issues, amerciaments, recognizances, (a) sum or sums of money to be paid in lieu or satisfaction of them or of them, which he has been authorized or required to levy by virtue of any writ or writs issued, or to any predecessor in office; and in case of fine, issue, amercement, forfeited recognizance, or sums of money paid or to be paid in lieu or satisfaction of them or any of them, shall not have been levied or paid, the causes of non-payment to be fully and particularly stated; and such account such sheriff, bailiff or other officer is hereby required to transmit, within thirty days from the expiration of the year for which such account ought to be made up, to the commissioners of his majesty's treasury, or at or within such other period as the sheriff, bailiff or other officer shall be required by the said commissioners of his majesty's treasury, or any three or more of them, in order that such account may be duly examined, checked and ascertained, under the direction of the said commissioners of his majesty's treasury, or any three or more of them; and when so examined and ascertained, such account shall be transmitted to the officer in the court of exchequer, or to the sheriff or other officer duly authorized to pass such account.

And be it further enacted, that every clerk of the peace and town clerk, or other proper officer, shall be required, within twenty days from the expiration of the court of general or quarter sessions, to send to the commissioners of his majesty's treasury a copy or an extract of the roll or rolls delivered by the sheriff, bailiff or other officer, on the day of the opening of such court of general or quarter sessions, in such form as shall be required by the said commissioners of his majesty's treasury, also the causes of discharge in case any person shall have been relieved on appeal to the said court of general or quarter sessions, and the answer by any sheriff, bailiff or other officer to such appeal, where any fine, issue, amercement, forfeited recognizance, (a) sum or sums of money paid or to be paid in lieu or satisfaction of them, or any of them, has not been received by such sheriff, bailiff or other officer duly authorized to receive the same.

DISTRINGAS.

7 & 8 Geo. 4. c. 71. s. 5.

By the stat. 7 & 8 Geo. 4. c. 71. s. 5. it is enacted, That in all cases where the plaintiff or plaintiffs shall proceed by original or other writ, and summons or attachment thereupon, or by subpoena and attachment thereupon, in any action at law against any person or persons not having privilege of parliament, no writ of distringas shall issue for default of appearance; but the defendant or defendants shall be served personally with the summons or attachment; at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service, to the effect following:—

"C. D. [naming the defendant], you are served with this process at the suit of A. B. [naming the plaintiff or plaintiffs], to the intent that you may appear by your attorney in his majesty's court of —, at Westminster, at the return hereof, being the — day of —, in order to your defence in this action; and take notice, that in default of your appearance, the said A. B. will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney."

But in case it shall be made appear to the satisfaction of the court, or, in the vacation, of any judge of the court from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendants, and then (a) it shall and may be lawful for the plaintiff or plaintiffs, by leave of the court, or order of such judge as aforesaid, to sue out a writ of distringas, to compel the appearance of such defendant or defendants; and that, at the time of the execution of such writ of distringas, there shall be served on the defendant or defendants, by the officer executing such writ, if he, she, or they can be met with, and if he, she, or they cannot be met with, there shall be left at his, her, or their dwelling-houses, or other place where such distringas shall be executed, a written notice, in the following form:—

"In the court of — [specifying the court in which the suit shall be depending], between A. B. plaintiff, and C. D. defendant [naming the parties]. Take notice, that I have this day distrained upon your goods and chattels for the sum of forty shillings, in consequence of your not having appeared by your attorney in the said court, at the return of a writ of —, returnable there on the — day of —, and that, in default of your appearing to the present writ of distringas, at the return thereof, being the — day of —, the said A. B. will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared thereon by your attorney."

"To C. D. the above named defendant."

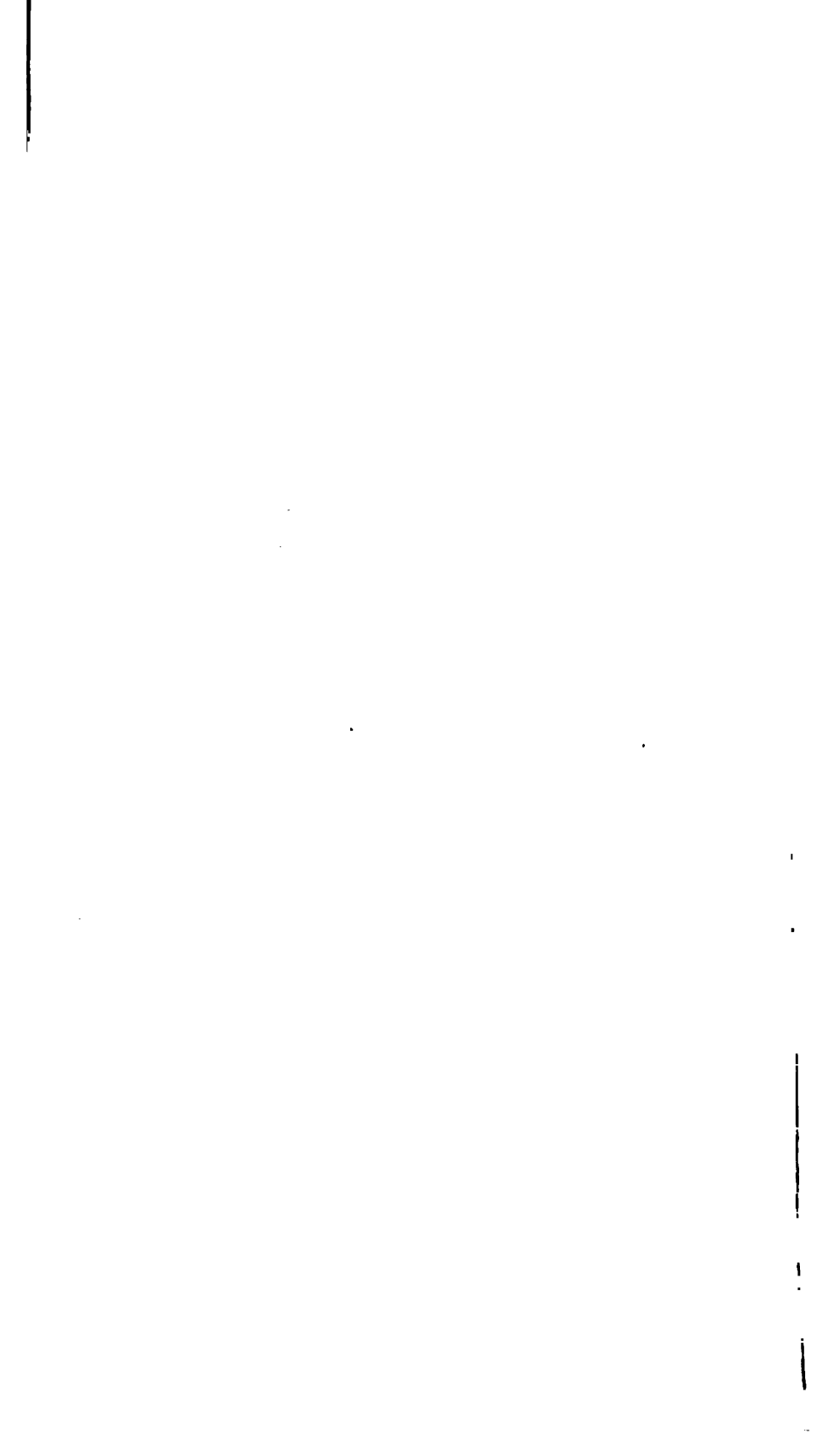
"E. F. [the name of the sheriff's officer]."

And if such defendant or defendants shall not appear at the return of such original or other writ, or of such distringas [as the case may be], or within eight days after the return thereof, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper court of the personal service of such summons or attachment, and notice written on the foot thereof, as aforesaid, or of the due exe-

cution of such distringas, and of the service of such notice as is hereby directed in the execution of such distringas [as the case may be], to enter a common appearance for the defendant or defendants, and to proceed thereon as if such defendant or defendants had entered his, her, or their appearance, any law or usage to the contrary notwithstanding; and that

such affidavit or affidavits may be made before a judge or commissioner of the court, out of which such writ shall issue or be returnable, authorized to take affidavits in such court, or elsewhere, the proper officer for entering common appearance in such court, or his lawful deputy; and every affidavit is hereby directed to be filed gratis.

END OF VOL. I.



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